Supreme Court, U.S.
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No. 03-04 98

IN THE

Supreme Court of the United States

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,
Petitioner,

v.

PACIFICORP,
(INCLUDING UTAH POWER & LIGHT COMPANY, A DIVISION),
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the adjudication of the Sherman Act (15 U.S.C. § 1, *et seq.*) under the federal antitrust laws by the district court requires, as a condition precedent, the filing by the party seeking antitrust relief of an application for wheeling with the Federal Energy Regulatory Commission under the Federal Power Act.

2. Whether, under *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), and *Patrick v. Burgett*, 586 U.S. 94, 101 (1988), the provisions of the Sherman Act of the federal antitrust laws are superseded under the state action immunity doctrine where the State has never held any hearing or made any adjudication to "exercise ultimate control over the challenged [private] anticompetitive conduct."

3. Whether, under *New York, et al. v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002) and *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927), the state statute relied on by the courts below to provide antitrust immunity, the Idaho State Electric Supplier Stabilization Act of December 8, 2000, conflicted with the bright, clear line drawn by the Commerce Clause of the Constitution establishing that the states lack jurisdiction to adjudicate wheeling of wholesale power.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rules 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption, except the State of Idaho, intervenor therein.

Pursuant to Supreme Court Rule 29.6, petitioner states that PacifiCorp is a public utility operating in interstate commerce and is wholly owned by Scottish Power, a British-owned company.

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v.

PACIFICORP,
(INCLUDING UTAH POWER & LIGHT COMPANY, A DIVISION),
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Snake River Valley Electric Association, an electric cooperative, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit below, *Snake River Valley Electric Association v. PacifiCorp* ("*Snake River II*"), is published at 357 F.3d 1042 (9th Cir. 2004), *pet. for reh'g en banc denied*, and is reproduced in the Petition Appendix A ("Pet. App.") at 1a-20a. The order of the district court of February 7, 2002 is

reproduced at Appendix B, Pet. App. 21a-28a. The order of the Ninth Circuit denying rehearing is reproduced at Pet. App. C at 29a. An earlier opinion of the Ninth Circuit, *Snake River Valley Electric Association v. PacifiCorp* ("*Snake River I*"), denying antitrust immunity for PacifiCorp, is published at 238 F.3d 1189 (9th Cir. 2001).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 9, 2004 and Snake River's petition for rehearing was denied on April 2, 2004. This Court has jurisdiction in this case under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS

This petition involves (a) a claim by the petitioner under the federal antitrust laws (15 U.S.C. §§ 15, 26), commonly known as the Clayton Act, in order to obtain injunctive relief requiring the wheeling of wholesale power and to provide compensation to the petitioner for past and continuing violation by the defendant under §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), and Section 3 of the Clayton Act, 15 U.S.C. § 14. The pertinent text of these provisions is set forth in Pet. App. D at 30a-30b.

STATEMENT OF THE CASE

The petitioner, Snake River Valley Electric Association ("Snake River" or "SRVEA"), filed its complaint on July 17, 1996 against respondent PacifiCorp under the federal antitrust laws for PacifiCorp's refusal to wheel (deliver) or sell wholesale power to Snake River. Snake River formed its electric cooperative in 1993, after extensive studies and investigations commencing in 1989, on behalf of a number of irrigation farmers and other interested members located in a rural unincorporated area in eastern Idaho served by PacifiCorp, almost surrounded by other cooperatives.

Over a three-year period from 1993-1996, Snake River made numerous requests to PacifiCorp seeking purchase of wholesale power and/or wheeling of power over its essential transmission system from another supplier (Idaho Power Co.), which were consistently denied by PacifiCorp. Snake River subsequently filed the complaint in this case on July 17, 1996. On August 7, 1996, PacifiCorp moved to dismiss Snake River's complaint, contending that it could not be ordered to wheel under the federal antitrust laws because of state action immunity, based on the Idaho Electric Supplier Stabilization Act enacted in 1970 ("Original ESSA").

The district court initially denied PacifiCorp's motion to dismiss on April 20, 1997. In 1997, after Idaho Power Co.'s offer to sell power had expired because PacifiCorp had refused to wheel, Snake River entered a five-year contract to purchase wholesale electric power from Enron Power Marketing, and sought a preliminary injunction to require PacifiCorp to wheel the wholesale power to it to avoid the loss of that contract. At the hearing on the preliminary injunction, PacifiCorp, to avoid a finding of irreparable injury for its then-admitted refusal to wheel, stipulated in open court that it would provide wholesale electricity to Snake River under the same terms and conditions as those in the Enron contract, if so required under the antitrust laws. The district court, based on this stipulation, denied the preliminary injunction that could have gotten Snake River into operation.

Subsequently, in 1998, the State of Idaho intervened and filed a motion for summary judgment, claiming antitrust immunity for PacifiCorp based on the Original ESSA. The district court then reversed its initial decision and granted the State's motion. Snake River appealed this decision to the Ninth Circuit Court of Appeals on February 19, 1999.

That court issued its opinion reversing the decision of the district court, holding that the utility was not shielded by state action immunity, and remanded the case. *Snake River Valley*

Electric Association v. PacifiCorp, 238 F.3d 1189, 1195 (9th Cir. 2001) ("*Snake River I*"). The Ninth Circuit in *Snake River I* held the second prong of the *Midcal* test:

> . . . requires that the state "*exercise ultimate control over the challenged [private] anticompetitive conduct.*" *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 . . .

238 F.3d at 1193; emphasis added. The Ninth Circuit in *Snake River I* ruled that:

> . . . *This prong ensures that "the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." Patrick v. Burgett*, 486 U.S. 94, 101. . . (1988).

Id.; emphasis added.

In the remand proceedings before the district court from the initial decision of the Ninth Circuit in *Snake River I*, the district court made a number of rulings enabling PacifiCorp to defeat that decision: (1) it ruled that Snake River had to file an application with the Federal Energy Regulatory Commission for wheeling of its alternate low-cost power supply from Idaho Power Company and Enron Power Marketing as a condition precedent to obtaining antitrust relief; (2) it excluded evidence of PacifiCorp's refusal to sell wholesale power to Snake River for three years starting in 1993, and evidence of PacifiCorp's open-court stipulation in 1997 at the preliminary injunction hearing, supporting its refusal to wheel power to Snake River; (3) it ruled that an amendment to the ESSA enacted by the Idaho Legislature on December 8, 2000 ("Amended ESSA") automatically gave PacifiCorp state action immunity as of that date, barring any injunctive relief under the federal antitrust laws that would enable Snake River ever to become an operating cooperative, regardless of antitrust violations by PacifiCorp prior to that date, or any damages subsequent thereto, even though there had been no

action by any state agency under the Amended ESSA determining the merits of these issues required by the new legislation;[1] and (4) it denied Snake River's claim that the State lacked jurisdiction under the Commerce Clause of the U.S. Constitution to adjudicate matters under the Amended ESSA involving the wheeling and sale of wholesale power in interstate commerce.

After eight days of trial, the court instructed the jury and gave the jury a verdict form listing seven questions. The first three of these provided as follows:

> Question 1. Were PacifiCorp's power lines that served SRVEA's potential customers essential to effective competition in the market for electrical power in that area of southeastern Idaho? Yes or No.
>
> Question 2. Was it impractical or uneconomical for SRVEA to construct their own facilities to serve their potential customers? Answer: Yes or No.
>
> Question 3 reads: Did PacifiCorp deny a request by SRVEA that it be provided access to PacifiCorp's power lines? Answer: Yes or No.

The jury returned a verdict answering Yes to Questions 1 and 2, but No to Question 3. The court had advised if they answered No to any of the initial questions, they need not proceed to the next question.

During the trial, PacifiCorp presented evidence over petitioner's objection that prior to filing its complaint, Snake River had never filed an application with the Federal Energy Regulatory Commission for wheeling of its wholesale power supply, obtained first from Idaho Power Company and later from Enron Power Marketing, and that this barred Snake River from any remedy under the federal antitrust laws for PacifiCorp's refusal to wheel.

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[1] There has been no such determination even to the present time.

The district court allowed PacifiCorp to quote regulations issued by the Federal Energy Regulatory Commission pertaining to applications for power service as applicable to the facts of this case. The court in its instructions to the jury ruled that "at times during the trial, the attorneys have referred to the Code of Federal Regulations, or C.F.R. These regulations have the force of law and may be quoted by the attorneys in their arguments."[2]

Also, before the trial, the district court had granted PacifiCorp's motion for summary judgment as to all claims under Section 2 of the Sherman Act that "PacifiCorp refused to sell electrical power to Snake River," Pet App.28a, while the district court conceded that there was ample evidence that PacifiCorp had monopoly power over transmission. It also granted PacifiCorp's motion *in limine* to exclude Snake River's evidence showing that for three years prior to filing the complaint in July 1996, PacifiCorp had consistently refused to sell any wholesale power to Snake River.

The courts below on remand also held that the amendment by the Idaho Legislature of the Original ESSA on December 8, 2000 barred Snake River from any antitrust

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[2] Counsel for PacifiCorp heavily stressed this ruling to the jury:

> The judge has told you in his instructions, . . . that the Code of Federal Regulations has the force of law and, of course, should be treated by you as such. And there are FERC regulations that govern requests for transmission services and they are specific and they are clear. Let's just look at 18 C.F.R. 2.20. . . the components of a good-faith request. . . for transmission services. . . . What's the second thing you have to include in your request? "A statement that the party requesting transmission is or will be upon commencement of the service an entity eligible to request transmission under Sections 211 and 213 of the Federal Power Act." . . . A statement that the request for transmission services is intended to satisfy the request for transmission services requirement under the Federal Power Act. . .

injunctive relief.[3] Pet. App. 10a. After the Original ESSA had been amended, PacifiCorp filed a petition with the Idaho Public Utilities Commission ("IPUC") pursuant to the newly amended 61-332D, seeking an order determining that PacifiCorp shall not be required to provide such wheeling service.

In the proceedings before the IPUC, the Commission rejected any summary judgment for PacifiCorp against Snake River under the new Amended ESSA because of genuine issues of disputed fact. Despite this, the district court, in a decision of February 7, 2002 before the trial, ruled that the Amended ESSA "immunized PacifiCorp from SRVEA's claims for refusal to wheel after December 8, 2000, the date ESSA was amended." Pet. App. 28a. The district court instructed the jury as a matter of law that the Amended ESSA barred Snake River under the federal antitrust laws to any injunction requiring PacifiCorp to wheel power for its cooperative system at any time, and that Snake River was limited to any damages for violation of the federal antitrust laws for the period ending December 8, 2000. PacifiCorp strongly argued this to the jury during the trial:

Damages is all this case is about. This case is not about Snake River Valley Electric Association going into business

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[3] The Amended ESSA provided as follows:

Idaho Code 61-332D. WHEELING SERVICES.

(1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction.

(2) An electric supplier declining to furnish wheeling service pursuant to this Section shall petition the Commission for a review of the electric supplier's action in respect to a request for such service. The Commission shall, upon notice and opportunity for a hearing, review the electric supplier's action for consistency with the purposes and provisions of this Act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

and serving any customers in the Idaho Falls area. The Idaho Legislature has now spoken on that subject. This court has ruled as a matter of law...they are not entitled under the existing laws to take over PacifiCorp's customers. That's not part of this case.

This denial of any injunctive relief under the federal antitrust laws for Snake River to become established as a viable cooperative had a negative impact on the entire case. At no time, however, has any state regulatory agency or authority issued any ruling under the Amended ESSA that Snake River's request to PacifiCorp for wheeling service "results in retail wheeling and/or a sham wholesale transaction."

In addition, the district court below denied Snake River's claim that the Amended ESSA of December 8, 2000 exceeded the state's authority under the Commerce Clause of the Constitution. It rejected Snake River's contention that a clear, bright line had been drawn between federal and state jurisdiction over wholesale sales of electricity in interstate commerce, which excluded the states from any jurisdiction over the wheeling of the wholesale power sought by Snake River.

The second decision of the Ninth Circuit Court of Appeals below, *Snake River Valley Electric Association v. PacifiCorp*, 357 F. 3d 1042 (9th Cir. 2004) ("*Snake River II*"), confirmed the rulings by the district court on these issues. Pet. App. 1a-20a.

REASONS FOR GRANTING THE PETITION

This petition presents an important case of denial of the applicability of the federal antitrust laws, long confirmed by decisions of this Court, to Snake River on three major issues:

(1) The decisions below are in direct contravention of this Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) ruling that the Federal

Power Commission has no authority to adjudicate the federal antitrust laws;

(2) The decisions below conflict with decisions by this Court as to the criteria required for applicability of the state action immunity doctrine in *California Retail Liquor Dealers v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980), *Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), and *Patrick v. Burgett*, 486 U.S. 94, 101 (1998), denying any state action immunity where the state, as here, has not actively supervised the details of the specific antitrust conduct at issue; and

(3) The decisions below, by upholding state action immunity based on the December 8, 2000 amendment to the ESSA by the Idaho Legislature—which sought to vest the state public utilities commission with the jurisdiction to determine whether the wholesale wheeling sought by Snake River was "a sham wholesale transaction"—conflict with the clear, bright line confirmed by this Court in many cases, most recently *New York, et al. v. FERC, et al.*, 535 U.S. 1, 8-9 n.6 (2002), establishing that the states lack constitutional authority to control wholesale power in interstate commerce.

I. THE COURTS BELOW ERRED IN RULING THAT SNAKE RIVER HAD TO FILE A REQUEST FOR WHEELING WITH THE FEDERAL ENERGY REGULATORY COMMISSION UNDER THE FEDERAL POWER ACT AS A CONDITION PRECEDENT TO ANY RELIEF UNDER THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S LONG-ESTABLISHED DECISION IN *OTTER TAIL POWER CO. V. UNITED STATES.*

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court definitively rejected the contention by a utility (Otter Tail, comparable to PacifiCorp) that the Federal

Power Act immunizes utilities from the federal antitrust laws with respect to a refusal to wheel or sell electric power for a competitor (new municipal systems comparable to Snake River, a cooperative). In that case, the utility argued that the Federal Power Commission (now named the Federal Energy Regulatory Commission) under its regulations governed the wheeling of power, and therefore the utility should be immune from the antitrust laws. This Court held to the contrary; that:

> There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest. . .

410 U.S. at 373-374. The Court then held that:

> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.
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> * * *
>
> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations.

410 U.S. at 374-375.

This Court has recently unanimously confirmed the *Otter Tail* decision in *New York, et al. v. Federal Energy*

Regulatory Commission, et al., 535 U.S. 1, 8-9 n.6 (2002). The Court confirmed that *Otter Tail* permitted "antitrust remedies against a utility company which, among other things, refused to sell power at wholesale to some municipalities."

Also, the ruling by the district court below and the Ninth Circuit's affirmance (in *Snake River II*), excluding evidence of PacifiCorp's longstanding refusal to deal with Snake River by refusing to sell wholesale power, improperly denied Snake River's rights under the federal antitrust laws. The district court granted PacifiCorp's motion *in limine* to bar any evidence relating to PacifiCorp's refusal to sell wholesale power to Snake River (commencing in 1993, three years before the complaint was filed). Pet. App. 28a. The decision below by the Ninth Circuit (*Snake River II*) affirming PacifiCorp's claim that it had not "refused to deal" by refusing to sell wholesale power to Snake River, Pet. App. 15a-16a, conflicts with *Otter Tail*. There, this Court upheld a decree that enjoined Otter Tail Power Company:

> . . . from refusing to sell electric power at wholesale to existing or proposed municipal electric systems in the areas serviced by Otter Tail...or from entering into or enforcing any contract which limits the customers to whom, and areas in which, Otter Tail or any other electric power companies may sell electric power.

410 U.S. at 368-69.[4]

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[4] This Court affirmed a district court decision that found:

> Here, Otter Tail refuses to sell power to municipalities which would thereby take retail power business from Defendant. . . .Because of its dominant position, Otter Tail is able to deprive towns of the benefits of competition, which would result from municipally-owned facilities.

United States v. Otter Tail Power Co., 331 F. Supp. 54, 61 (1971).

This Court's ruling is clear that a refusal to sell power by a utility which has monopoly power is a relevant factor to evaluate in determining an antitrust violation:

> . . . The record makes abundantly clear that Otter Tail used its *monopoly power* in the cities in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws. *See United States v. Griffith*, 334 U.S. 100, 107. . . .The District Court determined that Otter Tail has a *"strategic dominance in the transmission of power in most of its service area" and that it uses dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply.*
>
> * * *
>
> . . . There were no engineering factors that prevented Otter Tail *from selling power at wholesale to those towns that wanted municipal plants*. . . the District Court found—and its findings are supported—that Otter Tail's refusal to sell at wholesale...[was] solely to prevent municipal power systems from eroding its monopolistic position.

410 U.S. 377, 378; emphasis added. Thus, the ruling by the district court and the Ninth Circuit below in *Snake River II* that evidence as to PacifiCorp's refusal to sell power to Snake River should be excluded directly conflicts with this Court's controlling decision in *Otter Tail*. Similar conclusions exist as to the exclusion of any evidence of the 1997 PacifiCorp stipulation to the Ninth Circuit in open court, which would have demonstrated clearly that PacifiCorp was indeed refusing to wheel power to Snake River.

II. THE COURTS BELOW ERRED IN RULING THAT THE AMENDED ESSA AUTOMATICALLY SUPERSEDED THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S DECI-SIONS IN MIDCAL, TICOR, AND BURGETT.

The district court and court of appeals erred in terminating any remedies under the federal antitrust laws for Snake River as of December 8, 2000, based on an amendment to the ESSA by the Idaho Legislature as of that date.

Both of the courts below ruled that the Amended ESSA gave PacifiCorp permanent immunity from any injunctive relief under the federal antitrust laws to order it to wheel to Snake River at any time, and limited damages only to December 8, 2000. Pet. App. 21a, 8a-14a. The decision by the district court, which was communicated to the jury and consistently elaborated on by PacifiCorp throughout the trial, directly conflicted with the earlier decision of the Ninth Circuit based on decisions by this Court, and unlawfully precluded Snake River from obtaining any remedies under the federal antitrust laws, as ruled in *Snake River I.*

The Ninth Circuit in *Snake River I* held that PacifiCorp, under the Original ESSA, has no immunity from the federal antitrust laws because the ESSA was not self-policing tosatisfy the second prong of *Midcal*. The Ninth Circuit held that the second prong of the *Midcal* test:

> . . . requires that the state *"exercise ultimate control over the challenged [private] anticompetitive conduct." FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 . . .

238 F.3d at 1193; emphasis added. The Ninth Circuit in *Snake River I* ruled that:

> . . . *This prong ensures that "the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually*

> *further state regulatory policies." Patrick v. Burgett*, 486 U.S. 94, 101. . . (1988).

Id.; emphasis added.[5]

Of the changes enacted by the Amended ESSA on December 8, 2000, authorizing the Idaho Public Utilities Commission ("IPUC") to adjudicate certain issues, PacifiCorp has filed only for an adjudication under the new Section 61-332D. *See* fn.3, p. 6, *supra*. That Section states that an electric supplier shall not be required to supply wheeling service over its system if such service results in "retail wheeling and/or a sham wholesale transaction" and requires an electric supplier declining to supply electric service pursuant to the Section to petition the state Commission for review of the electric supplier's action. The Commission is, in turn, required under the amended ESSA to review the electric supplier's action for consistency with the purposes and provisions of ESSA, and issue an order in accordance with its findings, ordering "either that the wheeling service shall, or shall not, be required." *Id.*

The IPUC in an order issued October 30, 2001, denied PacifiCorp's request for summary judgment that Snake River was seeking wheeling from it for a "sham wholesale transaction" and scheduled discovery, testimony and a

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[5] In *Snake River I*, the Ninth Circuit also denied the claim by PacifiCorp and the State of Idaho that the four Idaho cases applying and enforcing the Original ESSA amount to active supervision under the Ninth Circuit's decision in *Nugget Hydroelectric, L.P. v. Pacific Gas and Electric Co.*, 981 F.2d 429 (9th Cir. 1992), ruling as follows:

> . . . While *Nugget* does hold that an equivalent number of cases act as active supervision. . . *those cases all involved reviews of the specific conduct at issue in Nugget*. . . the mere presence of cases reviewing general violations of the ESSA does not amount to active supervision in this case. . .

238 F.3d at 1195; emphasis added. There has been no such review by the Idaho PUC under the Amended ESSA.

hearing on the issue. However, after the district court's decision granting antitrust immunity to PacifiCorp effective December 8, 2000, Pet. App. 21a-24a, 28a, the IPUC took no further action in its proceeding.

Under the controlling decisions by this Court in *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104, (1980), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), and *Patrick v. Burgett*, 486 U.S. 94 (1998), PacifiCorp has not met the *Midcal* active supervision requirement because the State has not "exercised sufficient independent judgment and control so that the details of [the final results] have been established as a product of deliberate state intervention," citing *Ticor* 238 F.3d at 1194.

III. THE AMENDED ESSA CAN PROVIDE NO IMMUNITY FROM THE FEDERAL ANTITRUST LAWS BECAUSE THE STATE LACKS JURISDICTION TO ADJUDICATE WHEELING OF WHOLESALE POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

This Court has held in a number of cases that the states have no authority under the Commerce Clause of the U.S. Constitution to regulate wholesale sales of electric power in interstate commerce.[6] *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927) rules that:

> Plainly, however, the paramount interest in the interstate business carried on between two companies is not local to either state but is essentially national in character. The [wholesale rate] is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests, but, if such regulation is

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[6] The wheeling of wholesale power involved in the present case is clear. *Snake River I*, 238 F.3d at 1191.

> required, it can only be obtained by the exercise of the power vested in Congress.

These precedents by the Supreme Court under the Commerce Clause resulted in the enactment of the Federal Power Act in 1935. This Court in *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964) confirmed that the states had no jurisdiction over the sales and transportation of wholesale power in interstate commerce in the United States ("Congress meant to draw a bright line easily ascertained between state and federal jurisdictions. . . "). Since the enactment of the Federal Power Act in 1935, the Commission has ruled in innumerable cases, affirmed by the federal courts, that the States have no jurisdiction to regulate the wheeling of wholesale power for resale.

The Federal Energy Regulatory Commission, in issuing Order 888 in 1996 relating to the transmission of electric power at wholesale in interstate commerce, has ruled that the issue of any "retail-turned-wholesale" or "sham wholesale transactions" fall exclusively within federal jurisdiction. Order 888-A, CCH FERC Stats. and Regs. ¶ 31048 at 30402. The U.S. Court of Appeals for the D.C. Circuit affirmed the Commission's order. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 723-724 (D.C. Cir. 2000), which this Court has affirmed in *New York, et al. v. Federal Energy Regulatory Commission, et al.*, 535 U.S. 1 (2002).

Congress, in enacting the Energy Policy Act of 1992 to amend the Federal Power Act, expressly provided that nothing therein should amend the federal antitrust laws. 16 U.S.C. § 824k(e), Pet. App. 30a.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below summarily reversed, or the case set for argument.

Respectfully submitted,

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July 1, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-36057

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,
Plaintiff-Appellant,

v.

PACIFICORP,
(including Utah Power & Light, a division),
Defendant-Appellee,

STATE OF IDAHO,
Defendant-intervenor-Appellee.

December 3, 2003, Argued and Submitted,
Seattle, Washington
February 9, 2004, Filed

OPINION

Before: ANDREW J. KLEINFELD, RONALD M. GOULD, and RICHARD C. TALLMAN, *Circuit Judges*.

GOULD, *Circuit Judge*:

In this appeal, which marks the second time the parties have been before us, we again assess the scope of state action immunity from liability under federal antitrust law. The Idaho legislature responded to our prior opinion on state action immunity with legislation. We now assess whether, in light of these statutory changes, the responsibilities of the Idaho Public Utility Commission to review and approve certain

conduct of PacifiCorp challenged in this case by the Snake River Valley Electric Association ("Snake River" or "SRVEA") are sufficient to confer state action immunity.

I

This case regards SRVEA's suit against PacifiCorp, which alleged antitrust violations due to PacifiCorp's refusal (1) to sell to SRVEA its electrical system in Southeastern Idaho; (2) to sell wholesale electrical power to SRVEA; and (3) to wheel[1] wholesale electrical power obtained from another wholesale power generator to SRVEA via PacifiCorp's transmission lines.[2]

Snake River is an Idaho non-profit corporation, organized to deliver retail electricity to its members (mostly irrigation farmers) at lower rates than PacifiCorp charged. PacifiCorp is an electric power company that provides retail electricity to, *inter alia*, Snake River's potential customers. PacifiCorp also sells wholesale electricity nationwide through the wholesale power supply market.

In December 1995, Snake River by letter requested "wheeling" of wholesale electricity to the members of Snake River. PacifiCorp has claimed that this letter, sent to an

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[1] "Wheeling refers to a common industry practice where utility A delivers electricity to utility A's customers through utility B's transmission facilities." *Snake River Valley Elec. Ass'n v. PacifiCorp*, 238 F.3d 1189, 1190 n.3 (9th Cir. 2001) (internal quotation marks omitted).

[2] This latter claim was based on the "essential facilities" doctrine. The essential facilities doctrine applies to a competitor's refusal to deal when the competitor has monopolistic control over an essential facility in one market and uses that monopoly power to leverage returns from different markets by refusing to share access to the essential facility. *See, e.g.*, *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (applying *Otter Tail Power Co. v. United States*, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)).

officer with no responsibility for wheeling requests, gave insufficient information about Snake River for PacifiCorp to evaluate whether it could provide such wheeling service to Snake River. PacifiCorp responded on January 2, 1996, inviting further discussion with PacifiCorp's Senior Vice President for Transmission Services and Wholesale Sales.

Snake River did not then contact the Senior Vice President, and when PacifiCorp followed up with a telephone call, SRVEA declined to clarify its request. In a second letter sent February 16, 1996, PacifiCorp referred Snake River to two tariff schedules filed with the Federal Energy Regulatory Commission ("FERC"). Sending the tariffs was, according to testimony at trial on this issue, a standard operating practice for PacifiCorp when it received an application to wheel. Snake River never filled out an application, nor did it respond to the February 16 letter. So neither negotiations nor other clarifications of SRVEA's request occurred.

Instead, Snake River filed suit in July 1996 in the United States District Court for the District of Idaho. Snake River alleged violations of the antitrust laws from PacifiCorp refusing (1) to sell to SRVEA its electrical system in Southeastern Idaho; (2) to sell wholesale power to SRVEA; and (3) to wheel (transfer) wholesale power obtained from another generator to SRVEA via PacifiCorp's transmission lines.

PacifiCorp moved to dismiss the complaint on grounds of state action immunity. On April 25, 1997, the district court denied the motion. The State of Idaho moved to intervene on July 16, 1997, and the district court granted that motion.

On September 16, 1997, Snake River moved for a preliminary injunction to require PacifiCorp to wheel the wholesale power Snake River had obtained from a contract with Enron. Responding to the claim of irreparable injury, PacifiCorp stipulated that if Enron cancelled the contract and if

PacifiCorp was found to have violated antitrust law, then PacifiCorp would step into Enron's shoes and provide power according to the terms of the SRVEA-Enron contract. In part because of this stipulation, which countered the assertion of risk of irreparable injury, the district court denied Snake River's request for a preliminary injunction on December 9, 1997.

In January 1998, Idaho moved for partial summary judgment on state action immunity grounds, contending that it actively supervised the policies underlying the Idaho Electric Supplier Stabilization Act ("ESSA"). Former *Idaho Code* §§ 61-332 *et seq.* (1999). PacifiCorp supported this motion. The district court granted summary judgment, holding that PacifiCorp, even if it acted anti-competitively, had state action immunity from federal antitrust law.

Snake River appealed and we reversed. *See Snake River Valley Elec. Ass'n v. PacifiCorp*, 238 F.3d 1189 (9th Cir. 2001) (hereinafter "*Snake River I*"). We held that, though the ESSA had clearly articulated a policy restraining competition, the statute did not provide for active state supervision because PacifiCorp was allowed to act in any manner it chose with respect to wheeling and wholesale power sales. For these reasons, we held that PacifiCorp did not have state action immunity from SRVEA's antitrust law claims. *Id.* at 1195. We reversed the summary judgment and remanded the case to the district court for trial.

Responding to our opinion's express invitation that "Idaho's situation . . . could be addressed by legislative action providing for supervision," *id.*, Idaho enacted amendments to the ESSA to require active supervision by the Idaho Public Utilities Commission ("PUC") of private decisions affecting competition in Idaho's regulated market for power. *See 2000*

Idaho 1st Ex. Sess. Laws ch. 1.[3] The amendments took effect December 8, 2000.

Upon remand, PacifiCorp and Idaho moved for summary judgment on the grounds that the amended ESSA gave state action immunity and that PacifiCorp was immune from December 8, 2000 onward. PacifiCorp moved for summary judgment on the refusal to wheel claim, arguing that PacifiCorp did not refuse to deal because Snake River never made a request for wheeling, PacifiCorp also argued that summary judgment was appropriate on the refusal to sell wholesale power claim because PacifiCorp did not have a monopoly in the wholesale power market.

The district court awarded partial summary judgment to PacifiCorp. The district court held that, after December 8, 2000, the effective date of the ESSA amendments, PacifiCorp enjoyed state action immunity from SRVEA's claims. The district court further granted summary judgment to PacifiCorp on the claim that it had refused to sell power to SRVEA. Finding disputed issues of material fact on the claim of refusal to wheel before December 8, 2000, the district court set the remaining claim of refusal to wheel for trial.

Before trial, the district court addressed evidentiary matters on motions *in limine*. Two evidentiary rulings are now relevant to this appeal. First, PacifiCorp moved to exclude evidence of its conditional stipulation to step in Enron's shoes, made at the preliminary injunction hearing, if Enron cancelled the contract and if PacifiCorp was found to have violated the antitrust laws. The district court concluded that

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[3] The changes in the December 8, 2000 act were set, by the terms of the statute, to expire on March 1, 2001. On February 28, 2001, the Idaho Legislature made the changes permanent by repealing the December 8, 2000 law and instituting the same language without the expiration provision in the prior act's stead. *See* 2001 Idaho Sess. Laws ch. 29 § 1.

this stipulation was evidence of PacifiCorp's refusal to wheel, but relevant only "to rebut a defense by PacifiCorp that as of December 1997 it has never refused to wheel." Because PacifiCorp had stated that it "would not be raising that defense," the district court excluded the evidence. However, the district court explicitly conditioned that its ruling was "without prejudice to SRVEA's right to proffer the evidence during trial if the door is opened."

The trial court's second evidentiary ruling relevant on this appeal allowed the admission and discussion of the regulations promulgated by the FERC to regulate applications for wheeling.

After SRVEA had rested its case-in-chief, PacifiCorp moved to amend its answer to include a "regulatory justification defense." Snake River objected based on both the timeliness and legal basis for the defense. The district court overruled the objections to the assertion of the defense.

At the close of the trial on the issue of refusal to wheel before December 8, 2000, which was held between October 8 and October 17, 2002, the district court instructed the jury. Challenged on this appeal is instruction number 15, which stated in part:

> "To prove its claim, SRVEA must prove each of the following five elements by a preponderance of the evidence . . . . Third, that SRVEA requested and Pacificorp denied SRVEA access to Pacificorp's power lines . . . . Pacificorp responds to these claims as follows . . . (b) with regard to element three, SRVEA never made a proper application to use Pacificorp's power lines and filed this lawsuit before Pacificorp could evaluate SRVEA's request . . . ."

Although SRVEA objected to another portion of this instruction, it never objected, on the record, to the quoted portion of instruction 15 or to instruction 15 as a whole.

The jury returned a special verdict form in which the district court had posed seven questions. The jury was instructed to answer the first four questions sequentially as long as the answer was affirmative, but on these questions, which comprised the elements of the essential facilities claim, to stop and return the form if they answered "No" on any.[4] The jury marked "No" to the third question which had asked: "Did PacifiCorp deny a request by SRVEA that it be provided access to PacifiCorp's power lines?" Because the instructions had told the jury to go no further if it answered "No" to question three, that resolved the verdict against SRVEA.[5] The

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[4] The seven questions of the special verdict form were as follows:

(1) Were PacifiCorp's power lines that served SRVEA's potential customers essential to effective competition in the market for electrical power in that area of southeastern Idaho? [The jury marked "Yes."]

(2) Was it impractical or uneconomical for SRVEA to construct their own facilities to serve their potential customers? [The jury marked "Yes."]

(3) Did PacifiCorp deny a request by SRVEA that it be provided access to PacifiCorp's power lines? [The jury marked "No," and, as expressly instructed by the verdict form, skipped the remaining questions.]

(4) Were PacifiCorp's actions intended to, or did they have the effect of, creating or maintaining monopoly power in the market for electricity in southeastern Idaho?

(5) Did PacifiCorp actually rely on ESSA's anti-piracy provisions in refusing to deliver Enron's electricity to SRVEA's members?

(6) Did PacifiCorp reasonably and in good faith believe its actions were necessary and required to achieve a concrete and specific public policy expressed by the Idaho legislature in enacting ESSA?

(7) What, if any, are SRVEA's damages from the period May 1, 1997 to December 8, 2000?

[5] Although SRVEA had objected to the use of a special verdict form, it did not object to the specific language in question three. On this appeal, no issue is raised about the form or use of the special verdict form.

jury's negative response on the third question in its special verdict defeated SRVEA's refusal to wheel claim.

In light of the jury's verdict, the district court entered final judgment in favor of PacifiCorp on October 22, 2002. SRVEA timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

II

We first address whether the district court correctly ruled that PacifiCorp enjoyed "state action" immunity as of December 8, 2000, under the amended ESSA. As we explained in *Snake River I*, state action immunity derives from principles of federalism: Certain actions of the state that restrict competition are immunized from federal antitrust law. The test for state action immunity remains the same as outlined in *Snake River I*: that the challenged restraint must (1) reflect a clearly articulated state policy that permits the anti-competitive conduct and (2) that the permitted anti-competitive activities are actively supervised by the state. 238 F.3d at 1192 (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)).

Before analyzing whether the amended ESSA satisfies this test, we describe Idaho's current regulatory environment to aid understanding of the legal significance of the challenged activities of PacifiCorp. Because SRVEA waived the claims of its members who are not customers of PacifiCorp, *Snake River I*, 238 F.3d at 1191 n.5, all members of SRVEA whose claims are relevant to this appeal are currently served by PacifiCorp. The old ESSA did not have a prohibition on retail wheeling; the only provision at question in *Snake River I* was former *Idaho* Code § 61-332B (1999). That provision prohibited an entrant electrical supplier (here, SRVEA) from servicing the territory or customer of another supplier (here, PacifiCorp) without the written consent of the current sup-

plier. Stated another way, SRVEA could not supply power to PacifiCorp's customers without PacifiCorp's written consent. We recognized this fact in *Snake River I*, noting that "SRVEA not only asks PacifiCorp to *wheel* power, but also seeks PacifiCorp's consent to *provide* power to PacifiCorp's customers." 238 F.3d at 1191 (emphasis in original). With that understanding, we analyzed the portion of SRVEA's request that dealt with PacifiCorp's necessary consent to provide power to PacifiCorp's customers under the *Midcal* test because the withholding of consent was the only anti-competitive action covered by state statute, and thus the only action potentially eligible for state action immunity. We held, in *Snake River I*, that the statute, which provided PacifiCorp the ability to decide when, if ever, it would consent to allow SRVEA to service some of its territory or customers and provided no method for state regulation of that decision, did not satisfy the active supervision prong of *Midcal*.

In response to our decision, the Idaho legislature amended the ESSA in two ways that are significant for our analysis of state action immunity. First, the legislature added *section 61-332D*, which allows an electrical supplier to refuse to wheel if the requested wheeling "results in retail wheeling and/or a sham wholesale transaction." *Idaho Code* § 61-332D(1) (2004). If an electrical supplier refuses to wheel, that supplier is obligated to petition the Public Utilities Commission ("PUC") for a review of whether that supplier's actions are consistent with the ESSA. *Id.* § 61-332D(2). Second, *section* 61-332B was amended to prohibit an electrical supplier, such as SRVEA, from serving consumers or former consumers of another electrical supplier, such as PacifiCorp. There is an exception to this prohibition if the proposed supplier, such as SRVEA, petitions the Idaho PUC and the PUC issues an order allowing the service. *See Idaho Code* § 61-334B (2004).

Under this regulatory scheme, SRVEA faces two obstacles to providing electrical service to PacifiCorp's customers: First, SRVEA needs wheeling of power by PacifiCorp to get the power to the service area. Second, even if power is wheeled, any SRVEA "pirating," within the meaning of the ESSA, of those who are now or were PacifiCorp's customers, would be prohibited absent an order from the PUC granting an exception to *section* 61-332B. With these regulatory provisions in mind, we turn to the analysis required by *Midcal*, and will assess whether there was a clearly articulated state policy and active supervision by the state.

Snake River I held that the former version of Idaho's ESSA satisfied the clearly articulated state policy prong of *Midcal*. 238 F.3d at 1193. Given our remand and further proceedings, there has been no change on this score. Because the prior version of the ESSA satisfied this prong, and the State of Idaho strengthened its articulation of policy in the amendments to ESSA, we conclude that *a fortiori* the amended ESSA satisfies the clearly articulated state policy prong. The state has made abundantly clear that it is advancing a policy that restricts competition in this regulated area. *See, e.g.*, *Idaho Code* § 61-332(2) (2004). By contrast, in the normal unregulated context, our general federal antitrust law policy favors open competition between competitors for consumers. We do not normally view the active efforts of one competitor to gain customers from another as "pirating" to be discouraged. Yet here, casting its legislative eye on the regulated markets for retail power supply, the Idaho legislature has set a specific policy aimed at restricting competition for customers, maintaining stability, and protecting existing suppliers. *Id.* The state has clearly articulated its policy to "stabilize" this regulated market for retail electrical suppliers.

The "second prong of the *Midcal* test requires that the state 'exercise ultimate control over the challenged [private] anticompetitive conduct.'" *Snake River I*, 238 F.3d at 1193 (cit-

ing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)). To satisfy this prong, the private entity must demonstrate both that the state has the power to exercise control over the private anticompetitive conduct and that the state "in fact exercises [its] power." *Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 435 (9th Cir. 1992). The Supreme Court has established this test. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. at 634 ("The active supervision prong of the *Midcal* test requires that state officials *have* and *exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.") (emphases added) (citing *Patrick v. Burget*, 486 U.S. 94, 100-01, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988)).

The reasons for requiring such active supervision, and exercise of control, are not difficult to discern. A state may not merely establish a private preserve without competition and then leave the area unregulated in fact. As explained by the Supreme Court in *Ticor*, "actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." 504 U.S. at 633. Similarly, in *Snake River I*, we explained, "this prong ensures that 'the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.' In the absence of such review, 'there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.'" 238 F.3d at 1193-94 (citing *Patrick v. Burget*, 486 U.S. at 101) (internal citation omitted). We reaffirm this appropriate analysis. Applying this analysis to the case before us illustrates that, after the ESSA amendments, the State

of Idaho has not left unregulated a private preserve without *competition*.

This conclusion is supported when we address the state's role in reviewing PacifiCorp's refusal to wheel pursuant to *Idaho Code* § 61-332D. The literal language of the provision makes clear that the state has the power to control whether a refusal to wheel should be approved or reversed. The remaining issue concerns the exercise of that power. On December 8, 2000, the amended ESSA gave the PUC the authority to reverse refusals to wheel that are outside the policies of the ESSA. Because PacifiCorp did not file its *section* 61-332D petition until April 13, 2001, we cannot directly see the state's exercise of its statutory power before then. Here, the party refusing to wheel has the ability to invoke the exercise of state power. *See Idaho Code* § 61-332D(2) (stating that the "electrical supplier declining to furnish wheeling service . . . shall petition the commission for review of [its] action . . . ."). Although an unreasonable delay between a refusal to wheel and the exercise of state power might be a reason to reject state action immunity until a state had exercised its power, in this case, given the amendments to the ESSA, we cannot say that the five-month delay between the effective date of the amendments and the filing of the petition by PacifiCorp constitutes an unreasonable delay that would negate the conclusion that state power is being exercised.[6] Once the petition was filed, the record shows that the PUC exercised control by virtue of its proceedings, in which the parties presented briefing and argument. [7] Accordingly, we hold that

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[6] This case does not require us to determine whether, under Idaho law, the PUC could exercise its power *sua sponte*, or must await a petition from the utility refusing to wheel. There was no *sua sponte* exercise of power here.

[7] The PUC has not ruled on the underlying petition, apparently because the parties have not pressed the matter. The PUC has rejected PacifiCorp's motion for summary judgment and SRVEA's motion to dismiss,

PacifiCorp's refusal to wheel is protected by state action immunity.

There is also an additional ground for our decision on state action immunity. Under the prior version of the ESSA, the state did not have the power to review the decision of a public utility whether to allow another supplier to serve the utility's customers. *See Snake River I*, 238 F.3d at 1194-95. However, the amended ESSA explicitly prohibits a new supplier from "pirating" the customers of a public utility unless the PUC grants an exception, permitting the transfer of present or past customers. *See Idaho Code* §§ 61-332B, 61-334B (2004). Under the amended ESSA, a current electrical supplier has no independent power to permit a new supplier to service its existing (or former) customers. The power to control the division of consumers between current and potential electrical suppliers is controlled entirely by the PUC, a power that has not been invoked by SRVEA in this case. So far as customer transfer or allocation is concerned, this case did not present a challenge to any *private* anti-competitive conduct for the state to supervise. PacifiCorp cannot be said to have acted anti-competitively in declining to transfer customers because it does not have the power to make such a transfer: Under *section* 61-332B, PacifiCorp could not *allow* SRVEA to serve PacifiCorp's customers, even if PacifiCorp wanted to. Only the PUC can decide when a current utility can (or must) transfer customers to a new electrical supplier. Under this analysis, the second prong of *Midcal* is adequately satisfied in the sense that the state exercises ultimate control over transfer of customers because there is no other actor, including the public utility that is or was servicing the customers, with control over whether a new supplier can gain these custom-

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indicating that further proceedings are necessary. These proceedings to date show sufficient exercise of state power.

ers.[8] *Cf.* 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987) (suggesting that a statute that fixed a price margin between wholesale and retail prices may amount to active state supervision without actual state supervision over each decision on prices); *Ticor*, 504 U.S. at 640 (citing approvingly the *Duffy* language); *Snake River I*, 238 F.3d at 1194 (noting that the logic behind such a rule is that some state statutes regulate in such a manner that a private actor has "no discretion" to deviate from the state statute).

We hold that there is state action immunity for PacifiCorp on its refusal to wheel. Moreover, PacifiCorp's refusal to give some of its current or former customers to SRVEA was required by statute, also shielding PacifiCorp's action from antitrust liability from the effective date of the amended ESSA, December 8, 2000.[9]

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[8] Because the statute does not permit the transfer of customers by mere private action (i.e., PacifiCorp could not yield customers, without state approval from the PUC, even if it wanted to do so), another way to view this might be to say that the statute in question precludes the element of causal antitrust injury, *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977), rather than analyze the statute under state action immunity doctrine. That is, even if PacifiCorp acted anti-competitively by refusing to wheel, there is no injury to SRVEA because it could not have taken any of PacifiCorp's customers absent affirmative action by the PUC, because of the general prohibition of customer piracy in *Idaho Code* § 61-332B (2004).

[9] SRVEA argues that if we find state action immunity under the amended ESSA, then the state has violated the *Contracts Clause of the United States Constitution. U.S. Const. Art. I*, § 10, cl. 1. To prevail on this argument, SRVEA must show that the amended ESSA substantially impairs SRVEA's contractual relationship and that significant and legitimate public purposes do not justify the impairment. *See Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1098 (9th Cir. 2003) (quoting *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411-12, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983)). We need not address the question of substantial impairment, for we have no doubt that the

III

We next address whether summary judgment was appropriate for PacifiCorp on SRVEA's claim of antitrust violations predicated on PacifiCorp's decision not to sell wholesale power to SRVEA. SRVEA cites *Otter Tail Power Co. v. United States*, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973), for the proposition that refusal to sell wholesale power can constitute a "refusal to deal" sufficient for antitrust liability. But, as we see it, the key factual predicate for the finding of antitrust liability in *Otter Tail* was that the defendant had exploited its "strategic dominance in the transmission of power." *Otter Tail*, 410 U.S. at 377. *Otter Tail* notes that, although the defendant refused to sell wholesale power, the two relevant municipalities had the ability to obtain such power, but that Otter Tail, with control over the transmission lines, had refused to wheel that power. *Id.* at 371. It was the refusal to wheel, not the refusal to sell wholesale power, that was the crux of the antitrust violation, because Otter Tail had monopoly power in the former, not the latter.

Here, while there is evidence that PacifiCorp has monopoly power over transmission, there is no evidence that PacifiCorp

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amended ESSA reflects significant and legitimate public purposes: the prohibiting of unrestrained competition for retail electric customers and the avoiding of wasteful duplication of electrical suppliers, *Idaho Code* § 61-332(2) (2004), both satisfy the "significant and legitimate public purposes" requirement. Because the state is not a party to the contract, we defer to the legislature's judgment that the ESSA is necessary legislation to meet the stated purposes. *Campanelli*, 322 F.3d at 1098 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23, 52 L. Ed. 2d 92, 97 S. Ct. 1505 (1977)). Our conclusion is reinforced by the fact that for more than thirty years electricity supply has been highly regulated in Idaho, with the goals of eliminating unrestrained competition and reducing duplication. *See Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38, 84 L. Ed. 1061, 60 S. Ct. 792 (1940) (noting that substantial impairment analysis is influenced when the contract in question is made in an industry that is, at the time of contract, highly regulated by the state).

has a monopoly over wholesale energy transactions, in which the market is now highly competitive. SRVEA's contract with Enron illustrates that, as the record reflects, there is a vigorous competitive market for wholesale power. This precludes a claim of monopolization under *Section 2 of the Sherman Act*. *See, e.g., Pac. Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 817 (9th Cir. 1992) (noting that possession of monopoly power in the relevant market is a necessary element for an antitrust violation under *Section 2 of the Sherman Act*). SRVEA's own expert testified that there is vigorous competition in the wholesale power market, competition that did not exist at the time of *Otter Tail*.[10] We hold that, because PacifiCorp did not have a dominant position or a monopoly in the wholesale electricity generating market (as opposed to the transmission market), it can have no liability for refusal to deal by declining to sell power available from many other sellers. The district court did not err in granting summary judgment on this issue.

IV

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[10] The vigorous competition in the wholesale electricity market was prompted by the requirement of open, non-discriminatory wheeling of wholesale power. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, *codified at* 16 U.S.C. §§ 824j-824k (2004); *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. P 31,036, *61 Fed. Reg.* 21,540 (1996), *clarified, 76 FERC P* 61,009, 1996 *WL* 363765 and 76 *FERC P* 61,347, 1996 *WL* 799257 (1996), *on reh'g,* Order No. 888-A, FERC Stats. & Regs. P 31,048, 62 *Fed. Reg.* 12,274, *clarified,* 79 *FERC P* 61,182, 1997 *WL* 257595 (1997), *on reh'g, Order No.* 888-B, 81 *FERC P* 61,248, 62 *Fed. Reg.* 64,688, 1997 *WL* 833250 (1997), *on reh'g, Order No.* 888-C, 82 *FERC P* 61,046, 1998 *WL* 18148 (1998), *aff'd in part and remanded in part sub nom., Transmission Access Policy Study Group v. FERC*, 343 *U.S. App. D.C.* 151, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom., New York v. FERC*, 535 U.S. 1, 152 L. Ed. 2d 47, 122 S. Ct. 1012 (2002). No evidence was presented contradicting the fact that there is open competition in the wholesale electricity market.

We now turn to the jury verdict that found that PacifiCorp had not refused a request from SRVEA to wheel. If this verdict is sound, then it renders harmless any asserted error regarding the "regulatory justification" defense because the jury did not even address that question. *See, e.g.*, *Kendall-Jackson Winery Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1051 (9th Cir. 1998); *Janich Bros., Inc. v. Am. Distilling Co.*, 570 F.2d 848, 862 (9th Cir. 1977). SRVEA raises three claims that, in essence, attack the jury's verdict. Specifically, SRVEA contests two evidentiary rulings and one instruction to the jury.[11]

A

SRVEA first challenges the district court's evidentiary ruling *in limine* preventing SRVEA from introducing PacifiCorp's stipulation that, if antitrust liability was proven and if Enron terminated the contract, PacifiCorp would step into the shoes of Enron, a stipulation offered by PacifiCorp to negate the element of irreparable harm on the preliminary injunction motion. The district court noted that the evidence of the stipulation was irrelevant at the time of the motion *in limine* because PacifiCorp was not going to contest that, after the complaint had been filed, it had refused to wheel. SRVEA contends, however, that "at the trial, PacifiCorp claimed that it never denied a request by Snake River for wheeling." But if so, then SRVEA cannot prevail on this argument because it did not proffer the evidence of the stipulation after PacifiCorp made this purported argument. The district court had explic-

[11] We review the district court's rulings on evidentiary issues for abuse of discretion, *e.g.*, *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003), and we must conclude that the error was prejudicial before we may reverse. *Id.* The formulation of jury instructions is reviewed for abuse of discretion, *e.g.*, *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 883 (9th Cir. 2003), unless the appellant claims that the trial court misstated the elements that must be proved at trial. In that case, we review the instructions de novo. *Id.*

itly conditioned its *in limine* ruling, specifying that it was "without prejudice to SRVEA's right to proffer the evidence during trial if the door is opened." SRVEA on appeal claims that the door was opened, but our review of the records leads us to conclude that SRVEA did not proffer the evidence once the door had assertedly been opened. SRVEA, by its inaction at trial, has waived this issue in the sense that it cannot show harm from the district court's *in limine* ruling. *See, e.g., Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992).

B

SRVEA next objects to the district court's admission of evidence of FERC's regulatory requirement for "a good faith wheeling request." Although SRVEA argues that it was not subject to the specific FERC requirement, the evidence is relevant to PacifiCorp's asserted routine response to *all* wheeling requests. In other words, the evidence shows the jury what PacifiCorp did when it received the incomplete request from SRVEA. This ground for admission provides ample basis for us to conclude that the district court did not abuse its discretion. SRVEA's complaints about this evidence, in our view, go to weight, not to admissibility. Moreover, it appears that SRVEA waived its objection to this evidence in that the regulations were used to question one of SRVEA's experts, and SRVEA declined to object when PacifiCorp moved to take judicial notice of the regulations of the FERC. *See Whittaker*, 953 F.2d at 515. We see no error in the district court's ruling permitting this evidence to be considered.

C

Finally, SRVEA objects to the jury instructions. Specifically, SRVEA objects that Instruction 15 contains errors because it did not track the ABA model, it left the jury with the impression that refusal to wheel was irrelevant, and it

impermissibly gave credit to PacifiCorp's asserted defenses. SRVEA's concerns about this instruction, as argued on this appeal, were not raised before the district court. While there were three jury instruction conferences, only the third and final conference was formal and on the record. At the conference on the record, SRVEA only objected to the "last sentence on paragraph 2" of Instruction 15, a portion of the instruction that is not a basis for any assertions of error on this appeal. SRVEA's general objection that the court failed to use many of SRVEA's proposed instructions did not include an objection to the district court's rejection of the proposed alternative instruction (Plaintiff's # 41) on the essential theory doctrine. Because SRVEA did not raise the now-asserted objections to the district court with adequate specificity, SRVEA's assignments of error are waived. *See Fed. R. Civ. P.* 51(c)(1) (a party waives its objection to jury instructions unless it objects "stating distinctly the matter objected to and the grounds of the objection"); *Larson v. Neimi*, 9 F.3d 1397, 1399 (9th Cir. 1993) (holding that *Rule* 51 is "strictly enforced").

* * * *

The jury verdict is sound because the district court did not commit error on any of the three issues raised by SRVEA. We have no need to address, and do not address, PacifiCorp's argued "regulatory justification" defense because the jury's valid verdict, holding that PacifiCorp did not refuse a request from SRVEA for wheeling, renders unnecessary our consideration of whether the district court erred by permitting and instructing the jury on PacifiCorp's affirmative defense of regulatory justification. We affirm the jury's verdict rejecting SRVEA's antitrust claim that PacifiCorp refused to wheel before December 8, 2000.

V

For the foregoing reasons, we reject SRVEA's contentions on appeal and we affirm the district court in all respects.[12] Costs are charged to the Plaintiff-Appellants.

We review for an abuse of discretion the district court's decision awarding fees based on the timeliness issue per the agreed condition, based on the district court's inherent power to award attorneys' fees. *See, e.g., Lissner v. United States Customs Serv.*, 241 F.3d 1220, 1224 (9th Cir. 2001). We have reviewed SRVEA's arguments and PacifiCorp's response, and we conclude that the district court did not abuse its discretion by granting the limited amount of fees awarded to PacifiCorp. The lateness of the plaintiff's new damages theory and the substantial potential liability for defendant it entailed justified the condition and the amount of the fee. Under the circumstances, we affirm the district court's grant of the limited attorneys' fees in the specified amount.

AFFIRMED.

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[12] A remaining issue concerns attorneys' fees awarded by the district court to PacifiCorp. This award arises because SRVEA, on the eve of trial, introduced a new damage theory that increased PacifiCorp's potential liability by about $ 210 million. PacifiCorp objected that the new theory should be excluded because of the imminent trial, at first prevailing on this theory before the district court. SRVEA, for unrelated reasons, moved to continue the trial. The district court continued the trial and, then recognizing that continuance dispelled the reason for rejecting the new damage theory, ruled that SRVEA would be permitted to introduce its new damage theory, but on the condition that SRVEA pay the attorneys' fees that PacifiCorp incurred arguing the timeliness of the new theory before the motion for continuance. SRVEA accepted this condition, argued the new damages theory at trial, and lost. The district court then awarded $ 22,625.50 in fees and costs. SRVEA appealed that award, challenging only the amount of the fees, not the propriety of awarding fees.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

[Filed February 7, 2002]

Civil No. 96-0308-E-BLW

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,
Plaintiff,

v.

PACIFICORP,
(including Utah Power & Light Company, a Division),
Defendant.

STATE OF IDAHO,
by and through ALAN G. LANCE, Attorney General
Intervenor.

INTRODUCTION

The Court has before it a motion for summary judgment filed by defendant PacifiCorp and a motion for partial summary judgment filed by defendant-intervenor State of Idaho. The Court heard oral argument on the motions on January 31, 2002, and took them under advisement. For the reasons expressed below, the Court will grant the State's motion, finding that PacifiCorp has immunity from antitrust claims from December 8, 2000, onward. In addition, the Court will grant in part PacifiCorp's motion, dismissing all antitrust claims except the claim that PacifiCorp refused to wheel power to Snake River.

ANALYSIS

1. State Action Immunity

The Court, and the Ninth Circuit, have set forth the facts of this case in prior decisions, and those recitations will not be repeated here. *See Snake River v. PacifiCorp*, 238 F.3d 1189 (9th Cir. 2001). In *Snake River*, the Ninth Circuit held that the Electric Supplier Stabilization Act (ESSA) did not confer state action immunity on PacifiCorp. The Circuit concluded that the ESSA did not provide for the active state supervision required to trigger immunity, and suggested that this failure "could be addressed by legislative action providing for supervision." *Id.* at 1195,

Thus prompted, the Idaho Legislature passed amendments to the ESSA designed to "confer antitrust immunity upon parties acting in compliance with the act under what is known as the state action doctrine." *See* 2001 *Idaho Sess. Laws*, *chapter* 29, § 2. These amendments include three key provisions for the purposes of this litigation. First, Idaho Code 61-322D now states that any electrical supplier ref using to furnish wheeling service "shall" petition the Idaho Public Utilities Commission (IPUC) for review of its action and the IPUC "shall" review the matter and determine if the wheeling should occur. Second, Idaho Code § 61-333(1) states that contracts between electrical suppliers to allocate territories, consumers, or future consumers, "shall" be filed with the IPUC and the IPUC "shall" review the contract and accept or reject it, Third, Idaho Code § 61-332B prohibits suppliers from providing electrical service to consumers that are connected to the facilities of another supplier, except as provided in the ESSA.

In the short time the ESSA has been in effect, the IPUC has reviewed two petitions from electric suppliers seeking approval for service territory agreements under the new amendments to the ESSA. *See In the Matter of the Application of*

Avista Corporation, Case No. AVU-E-01-2; *In the Matter of the Application of Avista Corporation*, Case No, AVU-E-01-3. In addition, the IPUC is reviewing PacifiCorp's petition seeking an order that it need not provide wheeling services to Snake River. *See In the Matter of the Petition by PacifiCorp for an Order Determining that PacifiCorp is not Required to Provide Wheeling Service to Snake River Valley Electric Association*, Case No. Pac-E-01-6.

Interpreting the prior version of the ESSA, the Circuit found PacifiCorp was not entitled to immunity because it could "avoid competition for its customers simply by declining to consent—an act undertaken without review by any state agency," *Id*, at 1194. This is no longer the case under the ESSA amendments. Not only do the amendments mandate IPUC review of PacifiCorp's refusal to wheel, but the IPUC is now undertaking that very review. No longer does the ESSA "simply allow[ ] private parties to decide under what circumstances competition will be allowed." *Id.* at 1194.

Snake River asserts that the immunity issue should be resolved at trial. However, state action immunity is a question of law, and thus properly the subject of summary judgment. *See Columbia Steel Casting Co. v. Portland General Electric*, 111 F.3d 1427, 1442 (9th Cir. 1997). While Snake River claims that questions of fact preclude summary judgment, Snake River fails to identify those questions. Resolution of the state action immunity issue requires interpretation of state statutes and examination, of the state's practice under those statutes. *See Nugget Hydroelectric L. P, v. Pacific Gas and Elec. Co.*, 981 F.2d 429 (9th Cir. 1992). Snake River identifies no genuine issues of material fact concerning the interpretation of the ESSA amendments or the State's practice under those amendments.

Snake River argues next that this case is not ripe because the IPUC has not completed its review of PacifiCorp's petition for approval of its decision to decline Snake River's

wheeling request Snake River cites no authority, however, for the proposition that the immunity issue can only be decided after the state has examined the particular conduct at issue in the litigation, If that was the rule, the Ninth Circuit's decision in this case would have consisted of a few sentences summarily reversing this Court's decision on the ground that the State had not reviewed PacifiCorp's conduct, Instead, the Ninth Circuit interpreted the ESSA and examined the State's practice under that statute. *Nugget* used the same analysis. This Court will not depart from those authorities.

Snake River asserts that the stipulation entered into by PacifiCorp's counsel moots this issue, The Court disagrees. PacifiCorp never stipulated away its immunity defense, The Court likewise disagrees with Snake River's assertion that the Contract Clause of the Constitution applies here. When the parties entered into their stipulation—which appears to be the "contract" that Snake River asserts was impaired by the Idaho Legislature—all parties understood that the Idaho Legislature could change the law and confer immunity on PacifiCorp, That was a known risk. The stipulation would not go into effect until PacifiCorp was found to commit an antitrust violation, and that in turn depended on whether the Idaho Legislature changed the ESSA to confer immunity. Thus, both sides were awaiting the Legislature's action and the Court's analysis to determine if the stipulation had any effect. Under those circumstances, the Legislature's action cannot be deemed an unconstitutional impairment of contract.

For all these reasons, the Court finds that PacifiCorp had state action immunity for its actions after December 8, 2000, when the amendments to the ESSA took effect, The Court will therefore grant the motions of PacifiCorp and the State on this issue.

2. Antitrust Issues

Snake River's Amended Complaint makes claims under Sections 1 and 2 of the Sherman Act, and section 3 of the Clayton Act. The Sherman Act Section 1 claim is without support in the record. Section 1 prohibits collective actions that restrain trade. *See* 15 U.S.C. 1. At most, Snake River has alleged that PacifiCorp committed a unilateral refusal to deal, which does not constitute an illegal contract, combination or conspiracy within the meaning of Section 1 of the Sherman Act. *Monsanto Co, v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). For that reason, the Section 1 claim must be dismissed.

To prevail on a claim of-monopolization under Section 2 of the Sherman Act, a plaintiff must demonstrate "(1) [p]oss-ession of monopoly power in the relevant submarket; (2) will-ful acquisition or maintenance of that power; and (3) causal antitrust injury." *Pacific Express, Inc, v. United Airlines, Inc.*, 959 F.2d 814, 817 (9th Cir. 1992). Monopoly power, for the purpose of Section 2 of the Sherman Act, is "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). A plaintiff may demonstrate market power either by direct evidence or by circumstantial evidence. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). Direct proof of market power may be shown by evidence of restricted output and supra-competitive prices. *Id.* Such a showing "is direct proof of the in jury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power." *Id.* The more common method of establishing monopoly power is by circumstantial evidence. This requires the plaintiff to "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id.* at 1434.

Snake River's Amended Complaint, filed January 28, 2002, appears to focus its Section 2 challenge primarily on a claim that PacifiCorp refused to wheel power to Snake River. The Amended Complaint could, however, also be read to include claims that PacifiCorp violated Section 2 by refusing to sell power and electrical facilities to Snake River.

To prevail on its claim that PacifiCorp violated Section 2 by refusing to sell power, Snake River must show that PacifiCorp has a monopoly in the supply of electrical power in Snake River's market territory. *Pacific Express*, 959 F.2d at 817. Snake River cannot make this showing, however, because both Idaho Power and Enron have entered into contracts to provide electrical power to Snake River at competitive rates. Indeed, Snake River's own expert, Dr. John Wilson, observes that there is "vigorous competition" in the supply of power. *See Affidavit of Dr. Wilson* at p.11, ¶ 28. This claim must therefore be dismissed.

To the extent that the Amended Complaint can be read to allege that PacifiCorp violated Section 2 by refusing to sell facilities, Snake River cites no authority that compels a monopolist to sell facilities. This claim must likewise be dismissed.

That leaves the claim that PacifiCorp has refused to wheel power to Snake River. Dr. Wilson concludes that PacifiCorp has a monopoly in the transmission of power in Snake River's market territory of Eastern Idaho. *Id.* at p. 9, ¶ 22. Dr. Wilson further concludes that "it is not economically feasible for [Snake River] to build alternative transmission lines to receive power from sources other than PacifiCorp," *Id.* at p. 9, ¶ 23.

In response, PacifiCorp observes that Snake River's own study concluded that it would be economically feasible to build a transmission system. However, in light of Dr. Wilson's contrary conclusion, this evidence merely creates an

issue of fact. PacifiCorp also asserts that (1) Snake River has never made an, unambiguous request for wheeling, and (2) PacifiCorp has never refused to wheel power.

With regard to the first point, Snake River's President, Del Ray Holm, states in his affidavit, that on December 18, 1995, he wrote to PacifiCorp requesting "that it provide transmission service for our supply of wholesale power for Snake River from Idaho Power which would deliver that power at receipt points on PacifiCorp's transmission system to be wheeled to [Snake River] at facilities it would own at the delivery points and there resell [it] over the facilities owned by its members or to be constructed to [Snake River] to its members," *See Affidavit of Holm*, at pp. 4-5, ¶ 10. This testimony at least creates an issue of fact over whether Snake River ever made an unambiguous request for wheeling,

With regard to the second point, PacifiCorp is now seeking a decision by the TUC that it is not required to wheel power to Snake River. That creates an issue of fact over whether PacifiCorp is refusing to wheel.

Under these circumstances, summary judgment on the wheeling claim is not warranted. With the dismissal of the other claims, the refusal to wheel claim is now the only remaining claim. While Snake River brings that claim under both Section 2 of the Sherman Act and Section 3 of the Clayton Act, Snake River has never explained why it needs both Acts to bring this single claim. If this is a redundant pleading, the allegations under one of the Acts should be stricken under Rule 12(f). The Court will not do so at this time, however, because there has been no briefing on the issue. It is enough to say that unless the Court is convinced otherwise, Snake River will present its refusal to wheel claim under either Section 2 of the Sherman Act or Section 3 of the Clayton Act, but not under both Acts.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion for partial summary judgment filed by the State of Idaho (docket no. 142) is GRANTED, and that defendant PacifiCorp is deemed to have state action immunity from suit for antitrust violations as specified above from December 8, 2000, onward.

IT IS FURTHER ORDERED, that the defendant PacifiCorp's motion for summary judgment (docket no. 145) is GRANTED IN PART AND DENIED IN PART. It is granted to the extent that it seeks to dismiss (1) of all claims under Section 1 of the Sherman Act, and (2) all claims under Section 2 of the Sherman Act and Section 3 of the Clayton Act that PacifiCorp refused to sell electrical power and essential facilities to Snake River. It is denied in all other respects.

Dated this 7th day of February, 2002.

/s/ B. Lynn Winmill
B. LYNN WINMILL
Chief Judge, United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Apr. 2, 2004]

No. 02-36057

D.C. No. CV-96-00308-BLW
District of Idaho, Boise

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,
Plaintiff-Appellant,

v.

PACIFICORP,
(including Utah Power & Light, a division),
Defendant-Appellee,

STATE OF IDAHO,
Defendant-intervenor-Appellee.

ORDER

Before: KLEINFELD, GOULD, and TALLMAN, *Circuit Judges*.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

APPENDIX D

FEDERAL STATUTES

Section 3 of Clayton Act, 15 U.S.C. § 14

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

* * * *

Section 212 of Federal Power Act, 16 U.S.C. § 824k(e)

(e) Savings provisions.

(1) No provision of section 210, 211, 214 [16 USC §§ 824i, 824j, 824m], or this section shall be treated as requiring any person to utilize the authority of any such section in lieu of any other authority of law. Except as provided in section 210, 211, 214, [16 USC §§ 824i, 824j, 824m] or this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.

(2) Sections 210, 211, 213, 214 [16 USC §§ 824i, 824j, 824l, 824m], and this section, shall not be construed to modify, impair, or supersede the antitrust laws. For purposes of this section, the term "antitrust laws" has the meaning given in subsection (a) of the first sentence of the Clayton Act [15 USC § 12(a)], except that such term includes section 5 of the Federal Trade Commission Act [15 USC § 45] to the extent that such section relates to unfair methods of competition.

* * * *

Section 1 of Sherman Act, 15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * *

Section 2 of Sherman Act, 15 U.S.C. § 2

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(2)

No. 04-98

IN THE

Supreme Court of the United States

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,

Petitioner,

v.

PACIFICORP (Including UTAH POWER & LIGHT COMPANY, a division), *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PACIFICORP

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RESPONDENT PACIFICORP'S STATEMENT OF THE QUESTIONS PRESENTED

1. Does the factual determination by the lower courts that PacifiCorp lacks monopoly power in the wholesale market, (a market in which Snake River Valley Electric Association's own expert testified that there was vigorous competition), present a compelling reason for granting the petition for writ of certiorari?

2. Does the factual determination by the lower courts that the state of Idaho actively supervises the permitted anticompetitive conduct of PacifiCorp present a compelling reason for granting the petition for writ of certiorari?

3. Do the factual determinations by the trial court that PacifiCorp does not "unbundle" its services to Idaho retail customers, and that the state of Idaho does not require "unbundled" retail access, (neither of which factual determinations were challenged on appeal to the Ninth Circuit), present compelling reasons for granting the petition for writ of certiorari?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, PacifiCorp submits the following disclosure statement.

PacifiCorp is an Oregon corporation. PacifiCorp is an indirect, wholly-owned subsidiary of Scottish Power plc, a public limited company whose ordinary shares are traded on the London Stock Exchange and whose American Depository Shares are traded on the New York Stock Exchange.

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SUMMARY OF THE ARGUMENT

Snake River Valley Electric Association's ("SRVEA") petition for a writ of certiorari rests entirely on its disagreement with the factual determinations reached by the trial court and SRVEA's erroneous belief that the lower courts misapplied undisputed legal principles regarding jurisdictional boundaries of the Federal Energy Regulatory Commission ("FERC"). Recognizing that these issues do not offer a compelling reason to grant its petition, SRVEA struggles to fashion arguments warranting the involvement of this Court. SRVEA settles on an attempt to cloak its simple factual disputes in the garb of complex federal laws and illusory constitutional issues. But these disguises do not alter the true nature of the underlying arguments or the inability of SRVEA to support them.

SRVEA's first claim—that the trial court erroneously excluded evidence regarding PacifiCorp's purported refusal to sell it wholesale power, thereby violating *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)—merely challenges the factual determination made by the trial court, and affirmed by the Ninth Circuit, that PacifiCorp does not possess monopoly power in the *wholesale* power market. This factual determination precluded SRVEA from supporting its antitrust claim (which requires a showing of monopoly power in a relevant market) with evidence that PacifiCorp refused to sell *wholesale* power to SRVEA. The factual determination that SRVEA does not possess monopoly power in the wholesale market is supported by the evidence and is independent of, and in no way contrary to, this Court's holding in *Otter Tail*.

SRVEA's next claim—that there is inadequate state supervision over the alleged anticompetitive conduct of PacifiCorp to invoke the state action immunity doctrine—also seeks to rehash factual determinations made by the lower courts. The lower courts concluded that the state of Idaho, through its statutes and the proceedings of the Idaho Public Utilities Commission (the "Idaho PUC"), exercises sufficient supervision over the alleged anticompetitive conduct of PacifiCorp to support state action immunity. SRVEA's disagreement with this factual determination presents no compelling reason why this Court should grant the petition.

The final claim by SRVEA (which it did not raise below) —that the amended Electric Supplier Stabilization Act ("ESSA") violates the Commerce Clause—arises from SRVEA's misapplication of the undisputed law established by this Court in *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002). *New York* addressed the boundaries between the regulatory jurisdiction of the states and FERC by clarifying that FERC has the authority to regulate the *unbundled* transmission in interstate commerce by a public utility that is done either: (1) voluntarily by the public utility; or (2) because of a state retail program. The trial court reached the factual conclusions (again supported by the weight of admissible evidence) that PacifiCorp has not unbundled its services to Idaho retail customers, and the state of Idaho does not require unbundled retail access. Accordingly, the power granted to the state of Idaho by the amended ESSA does not impinge upon the regulatory jurisdiction of FERC.

STATEMENT OF THE CASE

I. Procedural History and Factual Background

PacifiCorp is an electric power company, providing retail electric service to customers in southeast Idaho and other states and selling wholesale power to others in the wholesale power supply market. (SRVEA's Excerpts of Record ("ER") 26-27.) As a public utility, PacifiCorp is subject to the jurisdiction of both the Idaho PUC and FERC. (*Id.*)

SRVEA is an Idaho nonprofit corporation that describes itself as a cooperative organized to acquire electric power at wholesale for resell to its members and others in areas of Idaho served by PacifiCorp. (State of Idaho's Excerpts of Record ("IER") 2.)

In December 1995, SRVEA sent PacifiCorp a letter requesting delivery of electric power, *i.e.*, wheeling, to "the existing delivery points on Utah Power's system to each of the members of [SRVEA]." (ER 110.) Beyond the fact that the letter was sent to an officer of PacifiCorp who had no responsibility over wheeling requests, the letter failed to identify SRVEA's members and other essential information that PacifiCorp needed to evaluate its ability to provide the services requested. (*Id.*; PacifiCorp's Supplemental Excerpts of Record ("SER") 176-77, 179-80, 214.)

PacifiCorp responded on January 2, 1996 by: (1) notifying SRVEA that its letter had been forwarded to PacifiCorp's Senior Vice President for Transmission Services and Wholesale Sales, Dennis Steinberg; (2) providing Mr. Steinberg's contact information to SRVEA; and (3) inviting "further discussion with him." (SER 251.)

PacifiCorp also began taking steps in anticipation of providing wheeling services to SRVEA. (*Id.*; SER 211-14.) Those steps included verifying that PacifiCorp had the transmission capacity to satisfy SRVEA's request and preparing a draft service agreement. (*Id.*)

Despite PacifiCorp's response, SRVEA chose not to contact Mr. Steinberg. (SER 200-01.) When PacifiCorp initiated a follow-up phone call, SRVEA declined to clarify its request. PacifiCorp later learned that SRVEA's "consultant," Carl Palmer, specifically directed SRVEA not to provide any information to PacifiCorp concerning SRVEA's December 18, 1995 request. (*See* SER 201, 239.)

Not having heard back from SRVEA, and thus still uncertain what SRVEA was requesting, PacifiCorp sent SRVEA *another* letter on February 16, 1996. (SER 240.) There, PacifiCorp referred SRVEA to two tariffs on file with FERC[1] and invited SRVEA to apply for service under those tariffs. (*Id.*) PacifiCorp's Manager of Contract Administration testified at trial that this was PacifiCorp's routine response to requests for wheeling it received in this time frame. (SER 219-20.)

SRVEA never filled out an application and ignored PacifiCorp's February 16, 1996 letter. (SER 218-19.) Instead, in July 1996, SRVEA filed this lawsuit in the U.S. District Court for the District of Idaho alleging that PacifiCorp had violated sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and section 3 of the Clayton Act (15 U.S.C. § 14) by refusing to: (1) sell to SRVEA PacifiCorp's electrical

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1. FERC sets or approves the rates and conditions for wheeling services like those requested by Snake River. (SER 181-82, 222.)

facilities; (2) sell to SRVEA wholesale power; and (3) wheel electric power. (IER 1-9.)

Shortly thereafter, PacifiCorp moved to dismiss SRVEA's complaint under the state action immunity doctrine. (IER 11-12.) On April 25, 1997, the trial court denied PacifiCorp's motion. (IER 31.) Although acknowledging that ESSA clearly articulated and affirmatively expressed a state policy of restraining competition for existing utility customers, the trial court held that the evidence then before it was not sufficient to establish active state supervision. (IER 27.)

Idaho subsequently moved for and was granted leave to intervene. (IER 32, 50-51.) In January 1998, Idaho moved for partial summary judgment on state action immunity grounds, contending that it *did* actively supervise its policies underlying ESSA. (IER 54-55.) PacifiCorp filed a brief in support of that motion. (SER 21.) Based on its review of the additional evidence and argument proffered by Idaho and PacifiCorp, the trial court granted partial summary judgment. (IER 77.)

On appeal, the Ninth Circuit reversed. *See Snake River Valley Elec. Ass'n v. PacifiCorp*, 238 F.3d 1189, 1190 (9th Cir. 2001) ("*Snake River I*"). In doing so, the Ninth Circuit confirmed that Idaho had clearly articulated and affirmatively expressed a policy of restraining competition for existing utility customers, but held that Idaho was not required to and, in fact, did not sufficiently supervise the policies underlying ESSA. *Id.* at 1195. The Ninth Circuit noted, however, that "[i]t should be clear that Idaho's situation . . . could be addressed by legislative action providing for supervision." *Id.*

Accepting that invitation, the Idaho Legislature called a special session resulting in the enactment of HB 1 and HB 142. *See* 200 1st ES Laws, ch. 1; 2001 Idaho Sess. Laws, ch. 29. (reproduced at IER 97-117). In those bills, the legislature clarified that ESSA, from its inception, was designed to prohibit pirating and other acts that detrimentally impacted the citizens of Idaho and the state's economy, and to confer state action immunity on utilities that complied with its provisions. *See* 2001 Idaho Sess. Laws, ch. 29, § 2

> The provision of a safe and reliable supply of electricity in a manner that prohibits the 'pirating' of consumers and discourages duplication of facilities is essential to the well-being of Idaho's citizens and its economy. . . . It was for these and other reasons that the legislature passed the Electric Supplier Stabilization Act in 1970.

See IER 98.

The legislature enacted amendments to ESSA designed to ensure that Idaho actively supervises all actions that fall within ESSA's purview. For example:

• Section 61-332B of ESSA prohibits "electric supplier[s]" from providing "electric service" to consumers that are then or have at any time previously been connected for electric services to facilities of another electric supplier, except as provided by ESSA. *See* State of Idaho's Statutory Addendum (I. Add.). A proposed new supplier may seek an exception to this otherwise absolute prohibition by petitioning the Idaho PUC under amended section 61-334B;[2] and

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2. Snake River has never petitioned the Idaho PUC for an exception under section 61-332B.

• Section 61-332D of ESSA provides that an electric supplier is not required to provide retail wheeling and/or engage in a sham wholesale transaction but *requires* an electric supplier declining to furnish wheeling service to petition the Idaho PUC for review of its action regarding a request for such service. The Idaho PUC is then *required* to review the electric supplier's action for consistency with ESSA, and to issue an order that the wheeling service either shall, or shall not, be required. *Id.*[3]

II. Summary Judgment

In November 2001, after conducting additional discovery relating to all of SRVEA's claims, PacifiCorp moved again for summary judgment asserting that, as a matter of law: (1) PacifiCorp was entitled to judgment on all claims for damages or injunctive relief after December 8, 2000—the date the ESSA amendments took effect (Idaho also renewed its state action immunity motion); (2) PacifiCorp could not be held liable for refusing to deal because SRVEA never made a specific, unambiguous request that PacifiCorp could have refused; (3) PacifiCorp was entitled to summary judgment on SRVEA's claim that PacifiCorp refused to sell wholesale power because PacifiCorp did not have monopoly power in the wholesale power market; and (4) PacifiCorp could not be held liable for violating federal antitrust laws because it reasonably relied, in good faith, on the public policy expressed in ESSA. (SER 25-26.)

On February 7, 2002, the trial court granted PacifiCorp's motion on all but one of SRVEA's claims. (ER 90.) First, the trial court dismissed SRVEA's claim that PacifiCorp violated antitrust laws by failing to sell SRVEA wholesale power.

3. PacifiCorp filed a petition to have the Idaho PUC review its response to Snake River's purported request. That petition is currently before the Idaho PUC.

(ER 89.) The court concluded that PacifiCorp could not be liable because the undisputed facts established that: (1) PacifiCorp did not hold a monopoly in the wholesale power market and (2) SRVEA had obtained a firm commitment and contract from another supplier in that market on competitive terms. Second, the court held that the state action immunity doctrine was applicable because "[n]ot only do the amendments [of ESSA] mandate Idaho PUC review of PacifiCorp's refusal to wheel, but the Idaho PUC is now undertaking that very review." (ER 87 (citations omitted).)

III. Trial

Trial proceeded on SRVEA's one remaining claim—PacifiCorp's alleged refusal to wheel—in October 2002. After an eight-day trial, the jury returned a special verdict form stating that PacifiCorp never denied a request by SRVEA that it be provided access to PacifiCorp's power lines. (SER 165-68.) The trial court then entered final judgment on behalf of PacifiCorp and dismissed all of SRVEA's claims. (ER 151.)

IV. Appeal

On November 19, 2002, SRVEA filed a notice of appeal asserting that the trial court had erred in its summary judgment rulings in favor of PacifiCorp, and in "all rulings adverse to plaintiff during the course of trial, including pretrial and trial rulings on motions in limine." (ER 114-15.) SRVEA did not, however, raise the issue of whether the amended ESSA violates the Commerce Clause—as SRVEA does now in its petition for writ of certiorari. On February 9, 2004, the Ninth Circuit issued a unanimous opinion rejecting

all of SRVEA's contentions on appeal and affirming the district court in all respects. *See Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042 (2004) ("*Snake River II*").

On July 1, 2004, SRVEA filed its petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

SRVEA bases its petition on what it perceives to be erroneous factual findings and the misapplication of undisputed law by the lower courts. Specifically, SRVEA claims that this Court's involvement is necessary to: (1) nullify the factual determination that PacifiCorp does not hold a monopoly in the wholesale power market (despite SRVEA's ability to obtain wholesale power at competitive rates from other suppliers); (2) undo the factual conclusion that the state of Idaho actively supervises the permissible anticompetitive conduct of PacifiCorp (notwithstanding the actual proceedings conducted by the Idaho Legislature and the Idaho PUC addressing the very conduct of PacifiCorp challenged by SRVEA); and (3) declare Idaho legislation void based on SRVEA's misapplication of undisputed law regarding the jurisdictional boundaries of FERC. These arguments are empty.

I. Standard for Granting a Petition for Writ of Certiorari

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Court R. 10. Under this standard, a petition for writ of certiorari is "rarely granted" when, as here, "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

II. The Lower Courts Made The Correct Factual Determination That PacifiCorp Could Not Be Liable For Refusing To Sell Wholesale Power To SRVEA Because PacifiCorp Does Not Have Monopoly Power In That Market And SRVEA Was Able To Obtain Wholesale Power At Competitive Rates

In its opening argument, SRVEA claims that the district court's exclusion of evidence at trial regarding PacifiCorp's purported refusal to sell *wholesale* power to SRVEA: (1) precluded SRVEA from presenting evidence of PacifiCorp's refusal to deal; and (2) contradicts the U.S. Supreme Court's decision in *Otter Tail*, 410 U.S. 366.[4]

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4. The heading used by SRVEA for its first argument does not correspond with the actual argument presented. Although the heading discusses whether SRVEA was required to file a request for wheeling with the FERC, the argument immediately following that heading discusses whether the lower courts erred in excluding evidence of PacifiCorp's purported refusal to sell wholesale power to SRVEA. PacifiCorp assumes that the actual argument made by SRVEA in its briefing, rather than the heading for that argument, is the relevant issue for purposes of this petition.

To the extent SRVEA does intend to rely on the heading of its first argument as an independent basis for granting its petition, SRVEA is incorrect. The district court never held that SRVEA was precluded from recovering under the antitrust laws absent proof that SRVEA filed an application for wheeling with the FERC. Rather, the district court merely allowed PacifiCorp to admit evidence of the FERC's regulatory requirement for "a good faith wheeling request," which both the trial court and the Ninth Circuit have deemed "relevant to PacifiCorp's asserted routine response to all wheeling requests." *Snake River II*, 357 F.3d at 1053

> In other words, the evidence shows the jury what PacifiCorp did when it received the incomplete request

(Cont'd)

Both the trial court and the Ninth Circuit concluded correctly that evidence about PacifiCorp's purported refusal to sell wholesale power is inapposite to whether PacifiCorp violated antitrust laws. To prevail on a claim of monopolization under section 2 of the Sherman Act, a plaintiff must demonstrate "(1) *the possession of monopoly power in the relevant market*, and (2) the willful acquisition or maintenance of that power. . . ." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (emphasis added).

As found by both the trial court and the Ninth Circuit, PacifiCorp does not possess monopoly power in the wholesale power market, and therefore does not possess the power to control prices or exclude competition in that market:

> [T]here is no evidence that PacifiCorp has a monopoly over wholesale energy transactions, in which the market is now highly competitive. SRVEA's contract with Enron illustrates that, as the record reflects, there is a vigorous competitive market for wholesale power. This precludes a claim of monopolization under Section 2 of the Sherman Act.

(Cont'd)

> from SRVEA. This ground for admission provides ample basis for us to conclude that the district court did not abuse its discretion. SRVEA's complaints about this evidence, in our view, go to weight, not to admissibility.

Moreover, "SRVEA waived its objection to this evidence in that the regulations were used to question one of SRVEA's experts, and SRVEA declined to object when PacifiCorp moved to take judicial notice of the regulations of the FERC." *Id.*

Snake River II, 357 F.3d at 1052.[5] Accordingly, a refusal by PacifiCorp to sell wholesale power to SRVEA cannot support a claim of monopolization.

The finding by the trial court and the Ninth Circuit that PacifiCorp lacks monopoly power in the wholesale power market is independent of, and does not conflict with, the holding in *Otter Tail*, 410 U.S. 366. Although there were allegations that the defendant in *Otter Tail* refused to sell the plaintiffs wholesale power, the *Otter Tail* Court did not have before it a motion for summary judgment on the absence of monopoly power. Indeed, the primary defense raised in *Otter Tail* was that the Federal Power Act gave the defendant immunity. The Court did not have before it, and did not decide, whether Otter Tail could be liable for violating the antitrust laws in the wholesale power market when, as here, it did not have monopoly power and when the plaintiffs were able to obtain contracts at competitive rates. Accordingly, *Otter Tail* is inapposite.[6] *Snake River II*, 357 F.3d at 1051 ("It was the refusal to wheel, not the refusal to sell wholesale power, that was the crux of the antitrust violation, because

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5. The Ninth Circuit further bolstered the conclusion that PacifiCorp did not hold monopoly power in the wholesale power market by acknowledging that "SRVEA's own expert testified that there is vigorous competition in the wholesale power market, competition that did not exist at the time of *Otter Tail*." *Id.*

6. Further, in the 1970s the municipalities in *Otter Tail* did not have the access to the wholesale market afforded by the Energy Policy Act of 1992 and FERC Order 888, issued in 1996, for open access wheeling. In contrast, Snake River not only had such access, it *in fact* entered into a wholesale power contract with Enron at "competitive rates" for delivery of power to receipt points in or near the areas it wanted to serve. (SER 75.)

Otter Tail had monopoly power in the former, not the latter.").[7]

III. The District Court And The Ninth Circuit Ruled Correctly That PacifiCorp Enjoys "State Action" Immunity As Of December 8, 2000, Under The Amended ESSA

SRVEA contends that the district court and the Ninth Circuit erred in making the factual determination that the state of Idaho actively supervises the permitted anticompetitive conduct of PacifiCorp—thereby precluding SRVEA from recovering damages after December 8, 2000

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7. SRVEA challenges the district court's evidentiary ruling in limine preventing SRVEA from introducing PacifiCorp's stipulation that, if antitrust liability was proven and if Enron terminated its contract with SRVEA, PacifiCorp would step into the shoes of Enron—a stipulation offered by PacifiCorp to negate the element of irreparable harm on the preliminary injunction motion. The district court reasoned that the stipulation was irrelevant at the time of the motion in limine because PacifiCorp was not going to contest that, after the complaint had been filed, it had refused to wheel.

In addressing the purported impropriety of the district court's in limine ruling, the Ninth Circuit noted that the district court had conditioned its ruling by specifying that the ruling was "without prejudice to SRVEA's right to proffer the evidence during trial if the door is opened." *Snake River II*, 357 F.3d at 1052-53. Although it concluded that the door had not been opened at trial, the Ninth Circuit held that even if the door had been opened, "SRVEA did not proffer the evidence once the door had assertedly been opened." Thus "SRVEA, by its inaction at trial, has waived this issue in the sense that it cannot show harm from the district court's in limine ruling." *Id.* (citing *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992)).

(the effective date of the amended ESSA). This claim is both moot[8] and incorrect.

The test for state action immunity, often called the "*Midcal* test," is that: (1) the challenged restraint must reflect a clearly articulated state policy that permits the anti-competitive conduct; and (2) the permitted anticompetitive activities are actively supervised by the state. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). SRVEA does not contend that the lower courts applied the wrong legal standard for determining if state action immunity exists. Rather, SRVEA disputes only the satisfaction of the second prong on the ground the lower courts made the erroneous factual finding that the state of Idaho actively supervises the alleged anticompetitive activities of PacifiCorp.

In analyzing whether the amended ESSA satisfies the *Midcal* test, the Ninth Circuit emphasized the importance of first understanding Idaho's current regulatory environment. *Snake River II*, 357 F.3d at 1048. This importance stems from the complex set of facts relied upon by the lower courts in concluding that active state supervision is present. The old ESSA did not prohibit retail wheeling. *Id.* Rather, the old

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8. All arguments by SRVEA regarding the allegedly improper invocation of the state action immunity doctrine by the district court and the Ninth Circuit to exclude evidence of damages after December 8, 2000 are moot. The jury did not find PacifiCorp liable of an antitrust violation and, therefore, never reached the issue of damages—specifically, the issue of whether SRVEA sustained damages after December 8, 2000. Stated alternatively, the finding by the jury that PacifiCorp did not violate antitrust laws eliminates the issue of whether SRVEA *should have been* able to recover additional damages after December 8, 2000 *if* the jury had found PacifiCorp liable.

ESSA prohibited an entrant electrical supplier like SRVEA from servicing the territory or customer of another supplier like PacifiCorp without the written consent of the current supplier. *Id.* Stated alternatively, SRVEA could not supply power to PacifiCorp's customers without PacifiCorp's written consent. Under the old ESSA, therefore, the only anticompetitive action by PacifiCorp potentially eligible for state action immunity was its decision to withhold consent from Snake River to provide power to PacifiCorp's customers. *Id.* It was this action by PacifiCorp that the Ninth Circuit in *Snake River I* decided was inadequately regulated by the state to satisfy the active supervision prong of the *Midcal* test.

In response to *Snake River I*, the Idaho Legislature amended ESSA in two ways that are significant here. First, the legislature enacted section 61-332D, which allows an electrical supplier to refuse any request for wheeling that "results in retail wheeling and/or a sham wholesale transaction." Idaho Code § 61-332D(1) (Michie 2004). Following such a refusal, the electrical supplier is required to petition the Idaho PUC for a review of whether the supplier's actions are consistent with ESSA. *Id.* § 61-332D(2) (Michie 2004). Second, the legislature amended section 61-332B to prohibit an electrical supplier, such as SRVEA, from serving consumers or former consumers of another electrical supplier, such as PacifiCorp, absent an order from the Idaho PUC authorizing the service. *See* Idaho Code § 61-334B (Michie 2004).

Under this regulatory scheme, SRVEA must clear two hurdles before providing electrical service to PacifiCorp's customers. First, SRVEA must persuade PacifiCorp to wheel power to the area SRVEA intends to service. Second,

assuming power is wheeled by PacifiCorp, any SRVEA "pirating," within the meaning of ESSA, of those past or current customers of PacifiCorp would be prohibited absent an order from the Idaho PUC under section 61-332B.

Given these regulatory provisions, both the district court and the Ninth Circuit concluded that the second prong of the *Midcal* test—that the state "exercise ultimate control over the challenged [private] anticompetitive conduct"—is satisfied by the state of Idaho. *See Snake River I*, 238 F.3d at 1193 (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992)). To meet this prong, PacifiCorp must prove that: (1) the state has the power to exercise control over the private anticompetitive conduct; and (2) the state in fact exercises that power. *See FTC*, 504 U.S. at 634 (1992) ("The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.").

The amended ESSA makes clear that the state of Idaho exercises ultimate control over the potentially anticompetitive conduct of PacifiCorp. *Snake River II*, 357 F.3d at 1049. This authority is codified in Idaho Code § 61-332D, which grants the state the power to control whether a refusal to wheel should be approved or reversed. The remaining issue concerns the exercise of that power.

The amended ESSA gives the Idaho PUC the authority to reverse refusals to wheel by PacifiCorp that conflict with the policies of ESSA. The amended ESSA also provides that the party refusing to wheel (here, PacifiCorp) *must* invoke the exercise of state power. *See* Idaho Code § 61-332D(2) (stating that "electrical supplier declining to furnish wheeling

service . . . *shall* petition the commission for review of [its] action. . . .") (emphasis added). On April 13, 2001, PacifiCorp filed its section 61-332D petition. Once the petition was filed, the Idaho PUC exercised control by virtue of its proceedings, in which both PacifiCorp and SRVEA presented extensive briefing and argument. In those proceedings, the Idaho PUC rejected PacifiCorp's motion for summary judgment and SRVEA's motion to dismiss, indicating that further proceedings are necessary. It is the existence of remaining proceedings that SRVEA relies upon in arguing that the Idaho PUC has failed to actively supervise the refusal by PacifiCorp. This argument lacks merit.

Beyond adopting the above analysis, the Ninth Circuit expressed an additional ground for its decision that the state of Idaho actively supervises the alleged anticompetitive conduct in this litigation. *Snake River II*, 357 F.3d at 1050-51. The amended ESSA prohibits an entrant supplier from "pirating" the present or past customers of a public utility unless the Idaho PUC grants an exception permitting such conduct. *See* Idaho Code § 61-332B, 61-334B (2004). Because a current electrical supplier like PacifiCorp has no independent power to permit a new supplier to service its existing or former customers, the second prong of the *Midcal* test is adequately satisfied in the sense that the state exercises ultimate control over transfer of customers. There is no other actor, including the public utility that is or was servicing the customers, with control over whether a new supplier can gain these customers. *Cf. Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (suggesting that statute that fixed price margin between wholesale and retail prices may amount to active state supervision without actual state supervision over each decision on prices); *FTC*, 504 U.S. at 640 (citing approvingly *Duffy* language).

IV. The Amended ESSA Does Not Encroach Upon The Jurisdiction Of FERC

SRVEA alleges the state action immunity doctrine cannot be invoked in this case because the amended ESSA—the legislation supporting that defense—is unconstitutional. Specifically, SRVEA alleges that the amended ESSA violates the Commerce Clause of the U.S. Constitution by usurping the jurisdictional powers of FERC. This argument is procedurally barred and incorrect.

A. The Issue Of Whether The Amended ESSA Violates The Commerce Clause Was Not Presented To The Ninth Circuit And Cannot Be Raised Here

The Ninth Circuit Court of Appeals was not permitted by SRVEA to opine on the issue of whether the amended ESSA violates the Commerce Clause. Instead, SRVEA argued only that the amended ESSA violates the Contracts Clause—a distinct argument rejected by the Ninth Circuit. *Snake River II*, 357 F.3d at 1051 n.9 (rejecting argument by SRVEA that amended ESSA violates Contracts Clause). This Court has held that a petitioner is precluded from attacking a judgment on grounds other than those presented in the court below. *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001)

> Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, . . . it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those

> arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.

Because SRVEA did not argue before the Ninth Circuit that the amended ESSA violates the Commerce Clause, it cannot now attack the Ninth Circuit's decision on that ground.

B. The Amended ESSA Does Not Violate The Commerce Clause

The claim by SRVEA that the amended ESSA violates the Commerce Clause rests on SRVEA's misapplication of the undisputed legal principles regarding the regulatory jurisdiction of the states and FERC established in *New York*, 535 U.S. 1 (2002).

States have the power to regulate transmission to the ultimate consumer, to determine the retail marketing areas of utilities, and to prescribe end-user services that those utilities must provide:

> [S]tates have the authority to determine the retail marketing areas of electric utilities within their jurisdictions, and the end user services that those utilities must provide. . . . [O]ur statement regarding state authority over the 'service' of delivering electric energy is intended to recognize the historical and local nature of delivering power to end users and the states' legitimate concerns and responsibilities in regulating local matters.

Order No. 888-A; Order on Rehearing, FERC Stats. & Regs., Regulations Preambles ¶ 31,048, at 30,344-45.

FERC, on the other hand, has the authority to regulate the *unbundled* transmission of power in interstate commerce that is done by a public utility either: (1) voluntarily; or (2) because of a state retail program. *See New York*, 535 U.S. at 11-12 ("Thus, '*if* a public utility voluntarily offers *unbundled* retail access,' or *if* a State requires *unbundled* retail access, 'the affected retail customer *must* obtain its unbundled transmission service under a non-discriminatory transmission tariff on file with the Commission.'" (first through fourth emphases added; citation omitted)). A transmission is "unbundled" when the utility separates the cost of transmission from the cost of the electrical energy when billing its retail customers.

SRVEA argues that the power granted to the state of Idaho under the amended ESSA to deny SRVEA's request that PacifiCorp wheel wholesale power for resale to SRVEA's members conflicts with this Court's decision in *New York*. SRVEA misapplies the holding in *New York*. *New York* clarifies that the type of conflict cited by SRVEA arises only *if*: (1) a public utility voluntarily offered unbundled retail access, or *if* the state required unbundled retail access; *and* (2) the state asserted jurisdiction over the rates, terms, and condition of the transmission service. The first prerequisite—that there be *unbundled* retail access—does not exist here. The trial court made the specific factual determination that "[t]here is no evidence in the record that PacifiCorp has unbundled its services to Idaho retail customers or that the State of Idaho has required unbundled retail access." (Memorandum Decision and Order at 11.) SRVEA presents no reason why this factual determination is erroneous.

Because the state of Idaho does not offer unbundled retail access, the amended ESSA does not conflict with *New York* and does not violate the Commerce Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 04-98

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In The Supreme Court of the United States

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,

Petitioner,

vs.

PACIFICORP (Including UTAH POWER & LIGHT COMPANY, a division),

Respondent,

and

STATE OF IDAHO, by and through LAWRENCE G. WASDEN, Attorney General,

Respondent/Intervenor.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT/INTERVENOR STATE OF IDAHO'S STATEMENT OF THE QUESTIONS PRESENTED

1. Does Idaho's amended Electric Supplier Stabilization Act (ESSA),[1] provide state action immunity from federal antitrust liability for ESSA-regulated conduct undertaken after December 8, 2000, the date ESSA's amendments first became effective?

2. Because it was not raised before the Ninth Circuit, should this Court consider Petitioner's argument that ESSA, as amended, conflicts with the Commerce Clause of the United States Constitution?

3. Does ESSA's regulation of the local, retail sale of electricity conflict with the dormant Commerce Clause of the United States Constitution?

[1] ESSA, as amended, is codified at Idaho Code §§ 61-332 through 61-334C. It is reproduced in the Respondent/Intervenor State of Idaho's Appendix A.

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RESPONDENT/INTERVENOR STATE OF IDAHO'S STATEMENT OF THE CASE

The State of Idaho heavily regulates the retail electric power industry. This regulatory scheme has resulted in "customers of Idaho's [investor-owned] electric utilities, on the average, currently pay[ing] some of the lowest electric rates in the nation." *See In re Changes Occurring in Elec. Indus.*, 172 P.U.R. 4th 11 (Idaho PUC 1996).

As part of the regulation of the electric industry, the Idaho Legislature, in 1970, passed the Electric Supplier Stabilization Act (ESSA). The purpose of ESSA is:

> [T]o promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the 'pirating' of customers of another electric supplier, discourage duplication of electric facilities, actively supervise certain conduct of electric suppliers as it relates to this act, and stabilize the territories and customers served with electricity by such suppliers.

Idaho Code § 61-332.

To accomplish these objectives, the Idaho Legislature adopted Idaho Code § 61-332B, which prohibits "electric suppliers"[2] from providing "electric service"[3] to consumers who are then or have at any time previously been connected for electric services to facilities of another electric supplier, except as permitted by order of the Idaho Public

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[2] Idaho Code § 61-332A(4) defines an "electric supplier" as "any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer."

[3] Idaho Code § 61-332A(5) defines "electric service" as "electricity furnished to an ultimate consumer by an electric supplier."

Utilities Commission (Idaho PUC), pursuant to the provisions and policies of ESSA. Idaho Code § 61-334B.

Snake River Valley Electric Association (Snake River) is a nonprofit cooperative organized to buy electric power at wholesale rates for resale to its members. In 1996 Snake River filed a federal antitrust complaint against PacifiCorp. The Ninth Circuit summarized the reason for Snake River's lawsuit as follows:

> SRVEA [Snake River] seeks to provide electricity to its members at a lower cost. As SRVEA owns no electric transmission facilities, it sought access to PacifiCorp's facilities to wheel power to its members as well as PacifiCorp's permission to serve PacifiCorp customers. PacifiCorp refused to grant consent, however, believing the ESSA authorized such refusal. As a result, SRVEA brought this antitrust action in the Idaho federal district court.

Snake River Valley Electric Association v. PacifiCorp, 238 F.3d 1189, 1191 (9th Cir. 2001) (*Snake River I*)

Relying upon ESSA, PacifiCorp moved, in part, to dismiss Snake River's complaint pursuant to the "state action doctrine," as first set forth in *Parker v. Brown*, 317 U.S. 341 (1943). The State of Idaho later intervened and filed its own motion for partial summary judgment, also contending that applicable portions of ESSA conferred state action immunity upon PacifiCorp. The District Court granted the State's motion. Snake River appealed, and on appeal the Ninth Circuit Court of Appeals reversed. *Snake River I*, 238 F.3d at 1195. The Ninth Circuit agreed that the State of Idaho, pursuant to ESSA, had clearly articulated and affirmatively expressed a state policy of restraining competition, one of the two elements necessary

for a finding of state action immunity. *Id.* at p. 1193. As to the second element, however, the Ninth Circuit held that the State of Idaho did not actively supervise the policies of ESSA, at least before ESSA was amended. *Id.* at p. 1195. The Ninth Circuit, however, stated in its decision: "It should be clear that Idaho's situation . . . could be addressed by legislative action providing for supervision." *Id.*

The Idaho Legislature responded to the Ninth Circuit's invitation. On December 8, 2000, just two months after the Ninth Circuit's initial decision, the Governor convened the Idaho Legislature in an Extraordinary Session to deal exclusively with the active state supervision of ESSA and its provisions.[4] The Legislature enacted HB 1. 2000 Idaho 1st E.S. Laws, chapter 1. Declaring an emergency, *id.*, section 22, the Legislature granted HB 1 an effective date of December 8, 2000. HB 1 had a March 1, 2001 sunset date, however, *id.*, section 13, and so in its 2001 regular legislative session the Legislature enacted HB 142 with an effective date of February 28, 2001.[5] 2001 Idaho Sess. Laws, chapter 29, section 16.

The Legislature stated its intent in enacting HB 142:

> The provision of a safe and reliable supply of electricity in a manner that prohibits the "pirating" of consumers and discourages duplication of facilities is essential to the well-being of Idaho's citizens and its economy. It was for these and

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[4] The Ninth Circuit's initial decision, reported as *Snake River Valley Electric Association v. PacifiCorp*, 228 F.3d 972 (9th Cir. 2000), was released on October 3, 2000. It was withdrawn and replaced by the court's Amended Opinion, which was released January 29, 2001.

[5] True and correct copies HB 1 and HB 142 are reproduced, respectively as Appendices B and C.

> other reasons that the legislature passed the Electric Supplier Stabilization Act in 1970. The legislature has been advised of federal antitrust litigation alleging that conformance with the provisions of this act does not confer federal antitrust immunity upon parties in compliance with the act. The legislature finds that a negative judicial ruling would have the effect of repealing applicable provisions of the act, undercutting the purposes for which this act was enacted.
>
> It is and has been the intention of the legislature to confer antitrust immunity upon parties acting in compliance with the act under what is known as the state action doctrine. While the legislature believes that compliance with the existing provisions of this act confers such immunity, it has determined to amend the act to more fully address this issue. The legislature therefore finds that it is in the public interest to enact the following amendments.
>
> 2001 Idaho Sess. Laws, chapter 29, Section 2.[6]

The substantial amendments to ESSA were designed to address the Ninth Circuit's concerns with respect to Idaho's active supervision of the policies of ESSA. These amendments, discussed below, establish that, since December 8, 2000, Idaho now actively supervises the policies of ESSA and provide the grounds for affirming the Ninth Circuit's decision.

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[6] Section 1 of HB 1 reads the same as Section 2 of HB 142. 2000 Idaho 1st E.S. Laws, chapter 1, section 1.

ESSA, as amended, places significant new duties and authority upon the Idaho PUC for supervising the policies of ESSA. For example, Idaho Code § 61-332C(2) states that no electric supplier shall construct or extend facilities, nor permit any connection to be made from any of its facilities, nor supply electric service in violation of ESSA's terms, except as ordered by the Idaho PUC.

Idaho Code § 61-332D states that an electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction. Section 61-332D goes on to require an electric supplier declining to furnish wheeling service pursuant to this section to petition the Idaho PUC for review of the electric supplier's action with respect to a request for such service. The Idaho PUC is, in turn, required to review the electric supplier's action for consistency with the purposes and provisions of ESSA, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.[7]

Idaho Code § 61-333(1) states that any electric supplier may contract with any other electric supplier for the purpose of allocating territories, consumers, and future consumers. Significantly, however, the statute goes on to state that all such contracts must be filed with the Idaho PUC, and the Idaho PUC shall approve or reject the

[7] Pursuant to Section 61-332D, PacifiCorp petitioned the Idaho PUC for review of its action to deny Snake River's request for wheeling services. Snake River removed PacifiCorp's petition to federal court. PacifiCorp moved to remand, which was granted. Subsequently, Snake River moved the Idaho PUC to dismiss PacifiCorp's petition and PacifiCorp moved for summary judgment, both motions of which the Idaho PUC denied. *Snake River Valley Electric Association v. PacifiCorp*, 357 F.3d 1042, 1049 n. 7 (9th Cir. 2004).

contracts. The Idaho PUC may only approve such contracts upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of ESSA.[8]

Idaho Code § 61-334A provides that any electric supplier or consumer whose rights under ESSA are violated or threatened with violation may file a complaint with the Idaho PUC for relief.

Idaho Code § 61-334B states that upon a petition of any consumer or electric supplier for an exception to Idaho Code § 61-332B, mentioned above, or Idaho Code §§ 61-332C(1)(a), (b), or (c), the Idaho PUC may grant the relief, but only if doing so is consistent with the purposes of ESSA, as set forth in Section 61-332. Section 61-334B(2) goes on to state that the Idaho PUC has the power to grant or deny authorizations and orders requested under ESSA, and that it may also attach conditions and terms as it determines are consistent with the purposes of ESSA. Thus, exemptions from ESSA's coverage may be granted, but only upon Idaho PUC review and approval.

The above-cited sections establish active state supervision. As the Ninth Circuit noted, "only the [Idaho] PUC can decide when a current utility can (or must) transfer customers to a new electrical supplier." *Snake River Valley*

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[8] Idaho Code § 61-333(2) states that any electric supplier "may also contract in writing with any other electric supplier for the sale, exchange, transfer, or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection (1) of this section and any contract validly entered into and approved by the commission after notice and opportunity for hearing shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law."

Electric Association v. PacifiCorp, 357 F.3d 1042, 1050 (9th Cir. 2004) (*Snake River II*). Thus, active state supervision is met "because there is no other actor, including the public utility that is or was servicing the customers, with control over whether a new supplier can gain these customers." *Id.* (*citing 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6 (1987)) (a statute that fixed a price margin between wholesale and retail prices may amount to active state supervision without actual state supervision over each decision on prices). Moreover, in the time since the December 8, 2000 ESSA amendments have been in effect, it is clear that the State of Idaho has been actively supervising the policies of ESSA. For example, the Idaho PUC has received, invited public comment, reviewed and subsequently approved petitions from electric suppliers concerning service territories, customers, and the purchase of facilities, finding that they are in conformance with the purposes of ESSA. *See e.g. In the Matter of the Application to Approve a Customer Allocation Agreement Between Avista Utilities and Kootenai Electric Cooperative*, 2002 WL 535354 (Idaho PUC Mar. 18, 2002); *In the Matter of the Application of United Co-Op, Inc. for Approval of an Agreement Pursuant to Idaho Code § 61-333*, 2002 WL 1486352 (Idaho PUC June 7, 2002); *In re Avista Corp.*, 2003 WL 22138570 (Idaho PUC Aug. 7, 2003); and *In re United Electric Co-op*, 2003 WL 22472161 (Idaho PUC Oct. 8, 2003).

Subsequent to ESSA's amendments, the State moved for partial summary judgment on the grounds that ESSA gave state action immunity from federal antitrust liability and that PacifiCorp was immune from December 8, 2000 onward, the date ESSA's amendments became effective. The district court granted the state motion. *Snake River*

II, 357 F.3d at 1046. After a jury trial on the remaining issues, in which PacifiCorp prevailed, Snake River once again appealed. As related to the issues litigated by the State, Snake River argued that ESSA's amendments did not confer state action immunity, but if they did, then the amendments violate the Contracts Clause of the United States Constitution. The Ninth Circuit rejected Snake River's arguments, holding that ESSA's amendments, as of December 8, 2000, the date the amendments became effective, provide a shield from federal antitrust immunity. *Snake River II*, 357 F.3d at 1051. The Ninth Circuit also rejected Snake River's Contracts Clause claim. *Id.* at 1051 n. 9. The Ninth Circuit did not rule, because the issue was not raised, that Snake River's claim before this Court that ESSA did or did not conflicts with the Commerce Clause of the United States Constitution.

Applying the law to the facts of this case, it is clear that the Ninth Circuit correctly affirmed the District Court's decision to grant the State of Idaho's motion for partial summary judgment.

ARGUMENT

I. There Is No Compelling Reason To Grant Certiorari

Rule 10 of the Supreme Court Rules provides that a writ of certiorari is a matter for judicial discretion, and will be granted *only* for compelling reasons. The Rule emphasizes that a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law, as Petitioners urge in the instant case. The Ninth Circuit's decision in this

case and its application of state-action antitrust immunity do not conflict with any decision of this Court, and is not in conflict with any decision of any other Circuit, or with a decision of any state court of last resort.

II. The State Action Doctrine Immunizes From Federal Antitrust Attack Anticompetitive Conduct That Is Directed By The State

Parker v. Brown, 317 U.S. 341 (1943), is the beginning point with respect to the state action doctrine. In *Parker*, this Court upheld as an "act of government which the Sherman Act did not undertake to prohibit," *id.* at 352, a California program that regulated production and marketing of raisins by the state's growers. The statute implementing the program authorized various anticompetitive practices. Although interested producers proposed and approved the marketing programs, this Court held that, "it is the state, acting through the Commission, which adopts the program and enforces it with penal sanctions, in the execution of governmental policy." *Id.* As such, according to this Court, principles of federalism immunized the anticompetitive activities from federal antitrust challenge: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly attributed to Congress." *Id.* at 351.

To be sure, only those competitive restraints which constitute "state action or official action directed by a state," *Parker*, 317 U.S. at 351, qualify for antitrust immunity. Accordingly, this Court has established a two-part test (known as the "*Midcal* test"), for determining immunity

under *Parker*: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*quoting Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)).

A. For State Action Doctrine Immunity To Apply, The State Must Clearly Articulate As Its Policy The Anticompetitive Conduct At Issue

With respect to the first part of the test, if the applicable statutory provision or rule clearly contemplates the anticompetitive conduct which is challenged, the "clear articulation" requirement is satisfied. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42, 44 (1985). In fact, as the United States Supreme Court has stated, in order to satisfy the first part of the *Midcal* test, "[i]t is enough, we have held, if suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 373 (1991) (*quoting Hallie*, 471 U.S. at 42).

B. For State Action Doctrine Immunity To Apply, The State Must Also Actively Supervise The Anticompetitive Policy

With respect to the second part of the *Midcal* test, in order to find active state supervision, it must be shown that the State "'exercise[s] ultimate control over the challenged anticompetitive conduct.'" *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S.

621, 634 (1992) (*quoting Patrick v. Burget*, 486 U.S. 94, 101 (1988)). The test requires that "'state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *Id.*

C. ESSA, As Amended, Satisfies The Requirements For State Action Immunity To Apply In This Case

1. The State Of Idaho Has Clearly Articulated And Affirmatively Expressed As State Policy The Activities That Snake River Challenges Under The Federal Antitrust Laws In This Case

There should be no doubt that, as a matter of law, the State of Idaho has clearly articulated and affirmatively expressed as state policy the anticompetitive conduct of which Snake River complains in this case. In the first appeal, the Ninth Court held "that ESSA clearly expresses a policy to displace competition among electrical suppliers, so that the first prong of *Midcal* is satisfied." *Snake River I*, 238 F.3d at 1193. In the second appeal, the Ninth Circuit stated,

> Because the prior version of the ESSA satisfied this prong, and the State of Idaho strengthened its articulation of policy in the amendments to ESSA, we conclude that *a fortiori* the amended ESSA satisfies the clearly articulated state policy prong. The state has made abundantly clear that it is advancing a policy that restricts competition in this regulated area.

Snake River II, 357 F.3d at 1049.

Snake River does not dispute this portion of the Ninth Circuit's ruling in its writ of certiorari. It is certainly not grounds for granting a writ of certiorari.

2. The State Of Idaho Actively Supervises Its Policy Of Restraint Of Trade As Set Forth in ESSA

Idaho's amended ESSA establishes that the State of Idaho "'exercise[s] ultimate control over the challenged anticompetitive conduct in this case.'" *Ticor*, 504 U.S. at 634 (*quoting Patrick*, 486 U.S. at 101). A review of the amended ESSA also indicates that "'state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *Id.* Indeed, the amendments to ESSA remedy the very deficiencies with ESSA, which the Ninth Circuit identified as reasons for holding that Idaho did not actively supervise the policies of ESSA, prior to its amendment. The amendments put Idaho exactly under what this Court has indicated is sufficient for the establishment of active state supervision.

ESSA, as amended, now does not allow electric suppliers the right to "opt out" of competition without state review. Indeed, ESSA prohibits one electric supplier from providing electric service to the customer of another supplier. Idaho Code § 61-332B. The only exception to this rule is if the Idaho PUC, upon a petition filed with it, enters an order finding that the requested exception is consistent with the overall policies of ESSA. Idaho Code § 61-334B. Furthermore, under ESSA an electric supplier can no longer contract with any other electric supplier for purposes of allocating territories, consumers, and future consumers unless the Idaho PUC approves the contract.

Thus, the State, and only the State, determines under what circumstances competition will be allowed. It is the State that supervises the policies of ESSA, and it is the State that ensures these policies are implemented and followed. The State has done so by granting significant and broad powers to the Idaho PUC to accomplish these objectives. There is no authority or control, partial or otherwise, granted to any electric supplier to avoid complying with ESSA.

Not only do the amendments to ESSA provide for active state supervision, the fact of the matter is that the State is actively supervising ESSA's policies. As mentioned above, since ESSA's amendments became effective, the Idaho PUC has received petitions from electric suppliers seeking approval for customer and service territory agreements. The Idaho PUC reviewed and subsequently has approved these agreements, finding that they are in conformance with the purposes of ESSA.

In short, as described above, under ESSA no electric supplier can contract with any other electric supplier for purposes of allocating territories, consumers, and future consumers unless the Idaho PUC approves the contract. No electric supplier can, on its own, opt out of ESSA's coverage. Only the Idaho PUC can approve contracts relating to the allocating of territories, consumers, and future consumers. Idaho Code §§ 61-333 and 61-334B. Only the Idaho PUC can determine when competition is to be allowed. Private party discretion has been eliminated; full authority to review conduct under ESSA has been granted to the Idaho PUC and it is exercising that authority.

The amendments fully and completely address the concerns addressed by the Ninth Circuit in *Snake River I*, as held by the Ninth Circuit in *Snake River II*. These amendments make clear that the State of Idaho actively supervises the policies of ESSA, as established by the Idaho Legislature. As such, state action immunity should attach to any claim that has as its basis conduct occurring on or after the effective date of ESSA's amendments, which was December 8, 2000.

Snake River contends that because the Idaho PUC has not yet entered a final order resolving PacifiCorp's petition under Idaho Code § 61-332D (that it need not provide wheeling services to Snake River), state action immunity does not exist. *Petition for a Writ of Certiorari*, pp. 13-15. There is no precedent for the proposition that state action immunity only attaches after a State undertakes and finally resolves a specific matter entrusted to a specific governmental agency within time constraints desired by an antitrust litigant. What the precedent teaches is that if the State "exercise[s] ultimate control over the challenged anticompetitive conduct," *Ticor*, 504 U.S. at 634, active state supervision exists sufficient to satisfy the state action doctrine. Given that the Idaho Legislature amended ESSA to provide active state supervision of the very activities challenged by Snake River in this case, it cannot be gainsaid but that active state supervision exists in Idaho under ESSA, as of December 8, 2000, as held by the Ninth Circuit in *Snake River II*.

III. Snake River Did Not Raise Before The Ninth Circuit Any Argument That ESSA, As Amended, Conflicts With The Commerce Clause Of The United States Constitution

Snake River did not raise before the Ninth Circuit the issue of whether ESSA conflicts with the Commerce Clause of the United States Constitution.[9] As such, this Court should not address the issue. *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"). Even if the Court were to address the issue, however, it is clear that there are no Commerce Clause impediments to ESSA's amendments.

IV. Amended ESSA Does Not Conflict With The Dormant Commerce Clause Of The United States Constitution

Snake River cites no federal statute or federal regulation voiding or preempting ESSA. Snake River argues that ESSA, as amended, cannot confer state action immunity because Idaho is without authority, pursuant to the dormant Commerce Clause of the United States Constitution, to adjudicate the wheeling of wholesale power. Snake River misrepresents ESSA's jurisdictional reach. The State

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[9] As noted above, Snake River did raise the issue of whether ESSA, as amended, violated the Contracts Clause of the United States Constitution. The Ninth Circuit rejected that claim, *Snake River II*, 357 F.3d at 1051 n. 9, and Snake River has not raised that issue in its petition before this Court.

of Idaho has not and is not asserting that it has jurisdiction over any interstate wheeling service request by Snake River. In addition, the State is not and has not suggested that it has jurisdiction over any interstate transmission or wholesale sale of power to Snake River.

What the State of Idaho does assert, pursuant to ESSA's amended provisions, is that it has jurisdiction to address Snake River's desire for retail wheeling in Idaho. This exercise of jurisdiction over retail wheeling is not precluded by the Commerce Clause of the United States Constitution, nor by Federal Energy Regulatory Commission (FERC) order or the Federal Power Act's (FPA) provisions. Indeed, sections 212(g) and 212(h) of the FPA specifically recognize that States may regulate the provisions of electric service in their states and may prohibit retail wheeling and sham wholesale transactions. Where federal law expressly allows that which ESSA addresses, it can be persuasively argued that the dormant Commerce Clause is violated.

Section 212(g) of the FPA prohibits FERC from issuing an order "which is inconsistent with any state law which governs the retail marketing areas of electric utilities." 16 U.S.C. §824k(g) (1994). ESSA is just such a law. Idaho Code §61-332B of ESSA clearly prohibits electric suppliers, like Snake River, from furnishing electric service to any electric customer "that is then or had at any time previously been lawfully connected for electric service to facilities of another electric supplier except as provided in this act." Finally, Idaho Code § 61-333 of ESSA states that the Idaho PUC shall review all supplier contracts that allocate territories, existing consumers, or future consumers.

Section 212(h) of the FPA makes clear that FERC is specifically prohibited, in part, from issuing an order conditioned upon or requiring the transmission of electric energy "to, or for the benefit of, an entity if such electric energy would be sold by such entity to an ultimate consumer. . . ." 16 U.S.C. § 824k(h)(2).

This statute recognizes that States possess jurisdiction over local (intrastate) facilities and the sale of electricity to retail customers. Indeed, Section 212(h) of the FPA prohibits the FERC from issuing an order requiring retail wheeling, which is the transmission of electric energy directly to an ultimate consumer. 16 U.S.C. § 824k(h)(1). This section also prohibits "sham wholesale transactions."[10]

Idaho Code § 61-332D is a state statute which prohibits retail wheeling and sham wholesale transactions. Its text addresses the very conduct that the language of Section 212(h) of the FPA excludes FERC from issuing orders concerning. Thus, Section 61-332D is not preempted or otherwise obstructed by FERC or any other federal legislation.

In short, the conduct that Sections 212(g) and 212(h) of the FPA exempt from FERC's jurisdiction is exactly

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[10] FERC has described "sham wholesale wheeling" as the "transmission of electric energy to an entity for resale to an ultimate consumer in instances in which the substance of the transaction amounts to retail wheeling because the wholesale sale to the entity is in fact a subterfuge intended to circumvent the ban on retail wheeling." *City of Palm Springs*, 76 FERC ¶ 61,127, 1996 WL 586752 (FERC) (July 31, 1996) at p. 12 *quoting* 138 Cong. Rec. S17613 (daily ed. Oct. 8, 1992 (statement of Sen. Johnston)); *Prairieland Energy*, 92 FERC ¶ 61,005, 2000 WL 876882 (FERC) (July 3, 2000) (Order on Rehearing).

what Snake River argues the State of Idaho cannot actively supervise and oversee here – issues related to retail marketing areas and retail wheeling. This being so, there can be no valid argument that ESSA, as amended, conflicts with the Commerce Clause of the United States Constitution

CONCLUSION

ESSA, as amended, confers state action immunity from federal antitrust liability from December 8, 2000 onward, the date ESSA's amendments became effective. ESSA does not conflict with the Commerce Clause of the United States Constitution, and in any event this Court need not review that claim because Snake River did not raise it with the Ninth Circuit. Thus, Respondent/Intervenor State of Idaho therefore respectfully requests that the instant petition be denied.

Respectfully submitted this 20th day of September, 2004,

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APPENDIX A

TITLE 61
PUBLIC UTILITY REGULATION
CHAPTER 3
DUTIES OF PUBLIC UTILITIES

61-332. PURPOSE OF ELECTRIC SUPPLIER STABILIZATION ACT. (1) This act includes sections 61-332 through 61-334C, Idaho Code, and shall be referred to herein as "this act" and may be cited and referred to as the "Electric Supplier Stabilization Act."

(2) This act and its amendments are designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of consumers of another electric supplier, discourage duplication of electric facilities, actively supervise certain conduct of electric suppliers as it relates to this act, and stabilize the territories and consumers served with electricity by such electric suppliers.

61-332A. DEFINITIONS FOR ELECTRIC SUPPLIER STABILIZATION ACT. As used in this act, unless the context requires otherwise:

(1) "Public utility" means an electric utility regulated by the Idaho public utilities commission.

(2) "Cooperative" means a cooperative corporation furnishing electric service in the state of Idaho to its consumer-members who own and operate the cooperative.

(3) "Municipality" means any municipal corporation or quasi-municipal corporation furnishing electric service to the consumers of the municipality in the state of Idaho.

(4) "Electric supplier" means any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.

(5) "Electric service" means electricity furnished to an ultimate consumer by an electric supplier.

(6) "Consumer" is any person, firm, corporation, or other entity receiving or intending to receive electric service at a specific service entrance.

(7) "Service entrance" means the location on the consumer's property where the consumer's main disconnect switch, fuses or other disconnect equipment exists, and which are intended to provide the means of cutoff of the supply.

(8) "New service entrance" means a service entrance not previously served with electricity. A change, improvement, replacement, enlargement, or change in location of a service entrance shall not be deemed a "new service entrance" if utilized to serve any service or utilization equipment previously served with electricity from the former service entrance, but for the provisions of this act shall be deemed the former "service entrance." A change in consumer shall not be construed to make an existing service entrance a "new service entrance." A change, enlargement, or other modification of service or utilization equipment served from an existing service entrance shall not be construed to make it a "new service entrance."

(9) "Transmission line," for the purposes of this act, means any electric line of an electric supplier carrying a voltage of sixty-nine (69) KV or more.

(10) "Service line," for the purposes of this act, means any single or multi-phase electric line of an electric

supplier used for carrying less than sixty-nine (69) KV and used or capable of use to provide electric service for a consumer.

(11) "Existing service line" means any electric service line in existence at the time of the event in question and constructed to supply a consumer that could be lawfully served by that electric supplier under this act. It shall not mean any service line constructed to obtain an advantage under this act, or to evade its purpose or terms.

(12) "Commission" means the Idaho public utilities commission.

61-332B. ELECTRIC SUPPLIER PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER ELECTRIC SUPPLIER. No electric supplier shall supply or furnish electric service to any electric service entrance that is then or had at any time previously been lawfully connected for electric service to facilities of another electric supplier except as provided in this act.

61-332C. PROVISIONS FOR SELECTING ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES. (1) In determining which electric supplier will provide electric service for a new service entrance, the following provisions will govern:

(a) If no electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of a new service entrance the consumer shall have the right of choice of electric supplier.

(b) If only one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance that electric supplier shall have the right to serve the consumer at the new service entrance.

(c) If more than one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance the electric supplier whose existing service line is nearest the new service entrance shall have the right to serve the consumer at the new service entrance.

(d) If more than one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance and it cannot be determined by proof which service line is nearest the new service entrance, then the consumer or an electric supplier shall petition the commission for an order determining which electric supplier is nearest the new service entrance.

(e) For purposes of this act distances shall mean the exact distance measured using standard land surveying practices as established by the board of professional engineers and land surveyors of the state of Idaho.

(2) No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connection to be made from any of its facilities to any new service entrance nor shall it supply electric service to any new service entrance in violation of the provisions of this section, except as ordered by the commission pursuant to this act.

61-332D. WHEELING SERVICES. (1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction.

(2) An electric supplier declining to furnish wheeling service pursuant to this section shall petition the commission for review of the electric supplier's action in respect to a request for such service. The commission shall, upon notice and opportunity for hearing, review the electric supplier's action for consistency with the purposes and provisions of this act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

61-333. AUTHORIZING CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES. (1) Any electric supplier may contract in writing with any other electric supplier for the purpose of allocating territories, consumers, and future consumers between the electric suppliers and designating which territories and consumers are to be served by which contracting electric supplier. The territories and consumers so allocated and designated may include all or any portion of the territories and consumers which are being served by any or all of the contracting electric suppliers at the time the contract is entered into, or which could be economically served by the then existing facilities of any contracting electric supplier, or by reasonable and economic extensions thereto. All such contracts shall be filed with the commission. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between cooperatives, between cooperatives and public utilities and between public

utilities. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between municipalities and cooperatives, as well as between municipalities and public utilities, provided however, the commission shall have jurisdiction only over cooperatives and public utilities in such approvals. The commission shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act.

(2) Any electric supplier may also contract in writing with any other electric supplier for the sale, exchange, transfer, or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection (1) of this section and any contract validly entered into and approved by the commission after notice and opportunity for hearing shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

61-333A. INCREASED AREA – EXTENSION OF SERVICE PERMITTED. In the event an area hereafter shall be included as a result of incorporation or annexation within the boundaries of a city, town or village, any public utility and any cooperative association organized for the purpose of furnishing electric service to its members or consumers only, furnishing electric service or operating electric facilities in such area prior to such inclusion, shall, unless the municipality acquire such facilities pursuant to section 61-333B, Idaho Code, and subject to the provisions of sections 61-332B and 61-332C, Idaho Code, have the right to continue and extend the furnishing of electric services in such area, and to utilize public streets, alleys and thoroughfares, or such portion of such annexed area

as is designated on the recorded plat for the installation of utilities, for such purpose. Such public utility or cooperative association shall comply with all lawful and reasonable safety requirements and the laws of the state of Idaho and nondiscriminatory ordinances of the city, town or village, as to the manner of constructing and maintaining electrical facilities therein.

61-333B. MUNICIPAL CORPORATION RESTRICTED IN SERVING NEW AREA PREVIOUSLY SERVED BY UTILITY OR COOPERATIVE ASSOCIATION – VOLUNTARY AGREEMENTS – ELECTION – APPEALS. In the event the annexing municipality has been furnishing electric service to its residents at the time of such annexation, or thereafter commences the furnishing of such service to its residents, nothing in this chapter shall prevent such municipality from extending its service to the annexed or incorporated area, upon the payment of just compensation, as defined in section 7-711, Idaho Code, to such public utility or cooperative serving such area prior to annexation, for any property, real or personal, including damages to the remainder of the system, if any, of such cooperative or public utility, used in distribution, transmission or supply of electrical energy to such area prior to annexation. As used herein, just compensation shall include consideration of new installations necessarily made between the time of annexation or incorporation and final settlement. Provided, however, in case the annexed area was previously served by a cooperative association, no extension shall be made by the municipal corporation, except upon the following conditions:

1. Until the terms and conditions of such extension, including just compensation therefor, have been finally

determined by voluntary agreement between the annexing municipality and the servicing cooperative association, or

2. In the event that such voluntary agreement cannot be made within ninety (90) days of the date of incorporation or annexation of such territory served by such cooperative association, then the municipal corporation may, if so determined by unanimous vote of its governing body, submit to the qualified electors of such municipality upon a special ballot to be voted upon at the next regular election of such municipality, the question "Shall portions of the. . . . of. . . ., Idaho which have heretofore been served electrical energy by. . . . become a part of the electrical system of the. . . . of. . . ., Idaho. Said areas are generally known and described as follows: (Insert description)."

A majority of the votes cast on said special ballot must be in favor of the proposition in order to approve the transaction on the part of the municipal corporation. Further, the cooperative association shall submit either by mail or at an annual or special meeting to its members, at the same time of the municipal election above mentioned, the question of whether or not the board of such cooperative association be authorized to sell to the municipality upon payment of just compensation, to be agreed upon, or if agreement be not reached, upon compensation determined as provided hereinafter. A majority of the votes cast must be in favor of the proposition in order to approve the transaction on the part of the cooperative association. At least 15 days before the vote by the members of the cooperative association, the association shall submit to the municipality a list of members eligible to vote and the municipality is hereby authorized to submit to said members a written statement of the

reasons for the transfer to electric service by the municipality.

If agreement cannot be reached upon the amount of just compensation, the matter shall be submitted to the district court of the county wherein the municipality is located pursuant to procedures of title 10, chapter 12, Idaho Code, for this purpose of fixing and determining the amount of just compensation as hereinbefore defined.

The court may appoint not more than two (2) experts to advise the court, and the costs of the action, including fees of such experts, shall be taxed equally to the parties.

Either party may appeal from the decision of the court in the same manner that other appeals are taken therefrom. No transfer of facilities shall be made until the amount of compensation has been finally determined and paid.

61-333C. NONMUNICIPAL SERVICE ORGANIZATIONS PROHIBITED FROM EXTENDING SERVICE. Nothing contained herein shall authorize any cooperative association or public utility having transmission lines presently within corporate limits of any municipal corporation, presently engaged in the sale of electrical energy to its citizens, to make any service connections within corporate limits of such municipal corporation from such transmission lines.

61-334. SPECIAL RULES OF INTERPRETATION. Nothing contained in this act shall be construed to:

(1) Grant the commission jurisdiction over cooperatives or municipalities except as authorized in this act.

(2) Apply to controversies between two (2) or more public utilities.

(3) Preclude any electric supplier from extending electric service to its own property or facilities or to another electric supplier for resale, provided any line extension made under this clause shall not be considered in determining the right of electric suppliers to serve new service entrances under section 61-332C, Idaho Code.

(4) Abrogate or limit the authority of any municipality under any other statute or law with respect to the municipality providing electricity to the municipality or the consumers of the municipality within the boundaries of the municipality.

61-334A. REMEDIES FOR VIOLATION OF THIS ACT. (1) Any electric supplier or consumer whose rights under this act shall be violated or threatened with violation may file a complaint with the commission against an electric supplier and any other person responsible for the violation.

(2) After notice and opportunity for hearing, the commission shall make findings of fact and conclusions of law determining whether this act or any orders issued under this act have been violated or threatened to be violated and shall determine whether there is actual or threatened irreparable injury as to the electric supplier or consumer whose rights are violated or threatened with violation as a basis for granting relief.

(3) The relief to be granted under this section for violation of this act shall forbid further acts in violation of

such orders, shall order the removal of any electric connections, facilities or equipment that constitute the violation, or a combination thereof necessary to enforce compliance with this act.

61-334B. COMMISSION SUPERVISION AND AUTHORITY. (1) Upon a petition by an electric supplier or consumer for an exception to the provisions of section 61-332B or 61-332C(1)(a), (b) or (c), Idaho Code, the commission shall issue an order granting such request only upon finding that granting the request is consistent with the purposes of this act as set forth in section 61-332, Idaho Code.

(2) The commission shall have power to issue authorizations and orders requested under this act, or to refuse to issue the same, and may attach to any authorization and order as a condition of approval such terms and conditions as it determines are consistent with the purposes and provisions of this act.

(3) In all matters arising under this act, which are submitted to the commission for decision, order or review, the procedure shall be governed by chapters 6 and 7, title 61, Idaho Code, and the commission's rules of procedure. Reconsideration of, appeal from, enforcement of, and stay of orders issued pursuant to this act shall be governed by law as for other orders of the commission in other matters.

61-334C. ELECTRIC SUPPLIER IMMUNITY. No action under the Idaho competition act, chapter 1, title 48, Idaho Code, or any other provision or doctrine of law of the state of Idaho shall lie against an electric supplier for action or inaction that is in compliance with the provisions

of this act or any commission order issued pursuant to this act.

APPENDIX B

LEGISLATURE OF THE STATE OF IDAHO
Fifty-sixth Legislature First Regular Session – 2000

IN THE HOUSE OF REPRESENTATIVES
HOUSE BILL NO. 1
BY WAYS AND MEANS COMMITTEE

AN ACT

RELATING TO THE ELECTRIC SUPPLIER STABILIZATION ACT; TO PROVIDE A STATEMENT OF INTENT; AMENDING SECTION 61-332, IDAHO CODE, TO CLARIFY THE PURPOSES OF THE ELECTRIC SUPPLIER STABILIZATION ACT AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-332A, IDAHO CODE, TO REVISE DEFINITIONS, TO DELETE A REFERENCE TO OBSOLETE MATERIAL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-332B, IDAHO CODE, TO REQUIRE APPROVAL OF THE PUBLIC UTILITIES COMMISSION FOR TRANSFERRING CONSUMERS; AMENDING SECTION 61-332C, IDAHO CODE, TO PROVIDE PROVISIONS FOR SELECTING AN ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332D, IDAHO CODE, TO SUPERVISE WHEELING SERVICES; AMENDING SECTION 61-333, IDAHO CODE, TO REQUIRE ELECTRIC SERVICE TERRITORY CONTRACTS TO BE FILED WITH AND APPROVED BY THE PUBLIC UTILITIES COMMISSION, TO PROVIDE FOR NOTICE AND HEARING REGARDING CONTRACT APPROVAL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-334, IDAHO CODE, TO PROVIDE

THAT THE PUBLIC UTILITIES COMMISSION HAS CERTAIN AUTHORITY OVER ELECTRIC SUPPLIERS, TO PROVIDE FOR APPLICATION OF PUBLIC UTILITIES LAW AND TO MAKE TECHNICAL CORRECTIONS; REPEALING SECTION 61-334A, IDAHO CODE; AMENDING SECTION 61-334B, IDAHO CODE, TO REDESIGNATE THE SECTION, TO PROVIDE FOR FILING A COMPLAINT WITH THE PUBLIC UTILITIES COMMISSION, TO PROVIDE FOR NOTICE AND HEARINGS, TO PROVIDE REMEDIES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334B, IDAHO CODE, TO PROVIDE COMMISSION SUPERVISION AND AUTHORITY; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334C, IDAHO CODE, TO PROVIDE ELECTRIC SUPPLIER IMMUNITY; REPEALING SECTIONS 61-332, 61-332A, 61-332B, 61-332C, 61-332D, 61-333, 61-334, 61-334A, 61-334B AND 61-334C, IDAHO CODE; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332, IDAHO CODE, TO PROVIDE THE PURPOSE OF THE ELECTRIC SUPPLIER STABILIZATION ACT; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332A, IDAHO CODE, TO PROVIDE DEFINITIONS FOR THE ELECTRIC SUPPLIER STABILIZATION ACT; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332B, IDAHO CODE, TO PROVIDE THAT AN ELECTRIC SUPPLIER SHALL BE PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER SUPPLIER; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332C, IDAHO

CODE, TO PROVIDE RULES FOR SELECTING ELECTRIC SUPPLIERS FOR NEW ELECTRIC SERVICE ENTRANCES; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-333, IDAHO CODE, TO AUTHORIZE CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334, IDAHO CODE, TO PROVIDE SPECIAL RULES OF INTERPRETATION; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334A, IDAHO CODE, TO PROVIDE LEGAL RELIEF FOR AGGRIEVED ELECTRIC CONSUMERS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334B, IDAHO CODE, TO PROVIDE LEGAL REMEDIES FOR VIOLATION OF THE ELECTRIC SUPPLIER STABILIZATION ACT; DECLARING AN EMERGENCY FOR VARIOUS SECTIONS, PROVIDING A SUNSET CLAUSE FOR ONE SECTION AND PROVIDING AN EFFECTIVE DATE FOR OTHER SECTIONS OF THIS ACT.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. LEGISLATIVE INTENT. The provision of a safe and reliable supply of electricity in a manner that prohibits the "pirating" of consumers and discourages duplication of facilities is essential to the well-being of Idaho's citizens and its economy. It was for these and other reasons that the legislature passed the Electric Supplier Stabilization Act in 1970. The legislature has been advised of federal antitrust litigation alleging that conformance with the provisions of this act does not confer federal

antitrust immunity upon parties in compliance with the act. The legislature finds that a negative judicial ruling would have the effect of repealing applicable provisions of the act, undercutting the purposes for which this act was enacted.

It is and has been the intention of the legislature to confer antitrust immunity upon parties acting in compliance with the act under what is known as the state action doctrine. While the legislature believes that compliance with the existing provisions of this act confers such immunity, it has determined to amend the act to more fully address this issue. The legislature therefore finds that it is in the public interest to enact the following amendments.

SECTION 2. That Section 61-332, Idaho Code, be, and the same is hereby amended to read as follows:

61-332. PURPOSE OF ELECTRIC SUPPLIER STABILIZATION ACT. ~~A.~~ **(1)** This act includes sections 61-332~~, 61-332A, 61-332B, 61-332C, 61-333, 61-334, 61-334A, and~~ **through** 61-334~~B~~**C**, Idaho Code, ~~as herein enacted, section 61-333A, Idaho Code, as herein amended, and sections 61-333B and 61-333C, Idaho Code, as already enacted,~~ and shall be referred to herein as "this act" and may be cited and referred to as the "~~e~~**E**lectric ~~s~~**S**upplier ~~s~~**S**tabilization ~~a~~**A**ct."

~~B.~~ **(2)** This act ~~is~~ **and its amendments are** designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of ~~customers~~ **consumers** of another **electric** supplier, discourage duplication of electric facilities, **actively supervise certain conduct of electric suppliers as it relates to this act,** and stabilize the territories

and ~~*customers*~~ **consumers** served with electricity by such **electric** suppliers.

SECTION 3. That Section 61-332A, Idaho Code, be, and the same is hereby amended to read as follows:

61-332A. DEFINITIONS FOR ELECTRIC SUPPLIER STABILIZATION ACT. As used in this act, unless the context requires otherwise:

(1.) "Public utility" means an electric utility regulated by the Idaho public utilities commission.

(2.) "Cooperative" means a cooperative corporation furnishing electric service in the state of Idaho to its consumer-members who own and operate the cooperative.

(3.) "Municipality" means any municipal corporation or quasi-municipal corporation furnishing electric service to ~~*its citizens*~~ **the consumers of the municipality** in the state of Idaho.

(4.) "**Electric s**~~S~~upplier" means any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.

(5.) "Electric service" means electricity furnished to an ultimate consumer by a**n electric** supplier.

(6.) "Consumer" is any person, firm, corporation, or other entity receiving or intending to receive electric service at a specific service entrance.

(7.) "Service entrance" means the ~~*entrance of electric service from facilities of the supplier to the service equipment or utilization equipment of the consumer. In determining "service entrance" reference shall be made to the definition of "entrance of the service to the service equipment*~~

~~*or utilization equipment" as defined in the national electrical code of 1965*~~ **location on the consumer's property where the consumer's main disconnect switch, fuses or other disconnect equipment exists, and which are intended to provide the means of cutoff of the supply**.

(8.) "New service entrance" means a service entrance not previously served with electricity. A change, improvement, replacement, enlargement, or change in location of a service entrance shall not be deemed a "new service entrance" if utilized to serve any service or utilization equipment previously served with electricity from the former service entrance, but for the ~~*rules*~~ **provisions** of this act shall be deemed the former "service entrance." A change in consumer shall not be construed to make an existing service entrance a "new service entrance." A change, enlargement, or other modification of service or utilization equipment served from an existing service entrance shall not be construed to make it a "new service entrance."

(9.) "Transmission line," **for the purposes of this act,** means any electric line of a**n electric** supplier ~~*for*~~ carrying a voltage of sixty-nine (69) KV or more.

(10.) "Service line," **for the purposes of this act,** means any **single or multi-phase** electric line of a**n electric** supplier **used** for carrying less than sixty-nine (69) KV and used or capable of use to provide electric service for a consumer.

(11.) "Existing service line" means any electric service line in existence at the time of the event in question and constructed to supply a consumer that could be lawfully served by that **electric** supplier under this act. It

shall not mean any service line constructed to obtain an advantage under this act, or to evade its purpose or terms.

(12) "Commission" means the Idaho public utilities commission.

SECTION 4. That Section 61-332B, Idaho Code, be, and the same is hereby amended to read as follows:

61-332B. ELECTRIC SUPPLIER PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER **ELECTRIC** SUPPLIER. No electric supplier shall ~~*construct or extend facilities, nor make any electric connections, nor permit any connections to be made to any of its facilities for the purpose of supplying electric service nor shall it*~~ supply or furnish electric service to any electric service entrance that is then or had at any time previously been **lawfully** connected for electric service to facilities of another electric supplier ~~*without the written consent of such other electric supplier; provided, however, (a) such other electric supplier is then, or was previously the last supplier, lawfully connected to said electric service entrance, and (b) such other electric supplier is willing and able to provide adequate electric service*~~ **except as provided in this act**.

SECTION 5. That Section 61-332C, Idaho Code, be, and the same is hereby amended to read as follows:

61-332C. ~~*RULES*~~ **PROVISIONS** FOR SELECTING ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES. **(1)** In ~~*the event more than one electric supplier is willing and able to provide adequate electric service to a consumer at any new electric service entrance, the following rules shall*~~ **determining which electric supplier will provide electric service for a new**

service entrance, the following provisions will govern:

~~1.~~**(a)** If no electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of ~~the~~ **a** new service entrance the consumer shall have the right of choice of **electric** supplier.

~~2.~~**(b)** If only one (1) electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance that **electric** supplier shall have the right to serve the consumer at the new service entrance.

~~3.~~**(c)** If more than one **(1)** electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance the **electric** supplier whose existing service line is nearest the new service entrance shall have the right to serve the consumer at the new service entrance.

~~4.~~**(d)** If more than one **(1)** electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance ~~and the existing service lines are equidistant from the service entrance, or~~ **and** it cannot be determined by proof which service line is nearest the new service entrance, then the consumer ~~shall have the right of choice of supplier~~ **or an electric supplier shall petition the commission for an order determining which electric supplier is nearest the new service entrance.**

(e) For purposes of this act distances shall mean the exact distance measured using standard land surveying practices as established by the

board of professional engineers and land surveyors of the state of Idaho.

(2) No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connection to be made from any of its facilities to any new service entrance nor shall it supply electric service to any new service entrance in violation of the ~~*rules herein, without the written consent of any electric supplier with a prior right under the rules to serve the consumer at the new service locations*~~ **provisions of this section, except as ordered by the commission pursuant to this act**.

SECTION 6. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332D, Idaho Code, and to read as follows:

61-332D. WHEELING SERVICES. (1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction.

(2) An electric supplier declining to furnish wheeling service pursuant to this section shall petition the commission for review of the electric supplier's action in respect to a request for such service. The commission shall, upon notice and opportunity for hearing, review the electric supplier's action for consistency with the purposes and provisions of this act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

SECTION 7. That Section 61-333, Idaho Code, be, and the same is hereby amended to read as follows:

61-333. AUTHORIZING CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES. ~~A.~~ **(1)** Any electric supplier may contract in writing with any other electric supplier for the purpose of allocating territories, consumers, and future consumers between the **electric** suppliers and designating which territories and consumers are to be served by which contracting **electric** supplier. The territories and consumers so allocated and designated may include all or any portion of the territories and consumers which are being served by any or all of the contracting **electric** suppliers at the time the contract is entered into, or which could be economically served by the then existing facilities of any contracting **electric** supplier, or by reasonable and economic extensions thereto. **All such contracts shall be filed with the commission. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between cooperatives, between cooperatives and public utilities and between public utilities. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between municipalities and cooperatives, as well as between municipalities and public utilities, provided however, the commission shall have jurisdiction only over cooperatives and public utilities in such approvals. The commission shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act.**

~~B.~~ **(2)** Any electric supplier may also contract in writing with any other electric supplier for the sale,

exchange, transfer, or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection ~~*A hereof. C. Any*~~ **(1) of this section and any** contract validly entered ~~*pursuant to this section*~~ **into and approved by the commission after notice and opportunity for hearing** shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

SECTION 8. That Section 61-334, Idaho Code, be, and the same is hereby amended to read as follows:

61-334. SPECIAL RULES OF INTERPRETATION. Nothing contained in this act shall be construed to:

(1.) Grant ~~*Idaho public utilities*~~ **the** commission jurisdiction over cooperatives or municipalities **except as authorized in this act**.

(2.) Apply to controversies between two (2) or more public utilities.

(3.) Preclude any electric supplier from extending electric service to its own property or facilities or to another electric supplier for resale, provided any line extension made under this clause shall not be considered in determining the right of **electric** suppliers to serve new service entrances under section 61-332C, Idaho Code.

(4) Abrogate or limit the authority of any municipality under any other statute or law with respect to the municipality providing electricity to the municipality or the consumers of the municipality within the boundaries of the municipality.

SECTION 9. That Section 61-334A, Idaho Code, be, and the same is hereby repealed.

SECTION 10. That Section 61-334B, Idaho Code, be, and the same is hereby amended to read as follows:

61-334~~B~~**BA**. ~~*LEGAL*~~ REMEDIES FOR VIOLATION OF THIS ACT. ~~*A.*~~**(1)** Any electric supplier **or consumer** whose rights under this act shall be violated or threatened with violation~~*, shall be entitled to injunctive relief against said violation upon proper*~~ **may file a** complaint ~~*and proof in accordance with Idaho rules of civil procedure in district court, against the other*~~ **with the commission against an** electric supplier and any other person responsible for the violation.

~~*B.*~~**(2)** ~~*In any suit for injunctive relief*~~ **After notice and opportunity for hearing, the commission shall make** findings **of fact** and conclusions ~~*by the court that any rules under*~~ **of law determining whether** this act **or any orders issued under this act** have been violated or threatened to be violated **and** shall ~~*require findings and conclusions by the court of*~~ **determine whether there is** actual or threatened irreparable injury as to the electric supplier **or consumer** whose rights are violated or threatened with violation as a basis for ~~*equitable relief hereunder*~~ **granting relief**.

~~*C.*~~**(3)** The ~~*injunctive*~~ relief to be granted under this section for violation of this act shall ~~*be negative in form, enjoining*~~ **forbid** further acts in violation of such ~~*rules*~~ **orders**, shall ~~*be affirmative in form in requiring*~~ **order the** removal of any electric connections, facilities or equipment that constitute the violation~~*, and shall be*~~ **or** a combination thereof necessary to enforce compliance with this act.

~~*D. Any aggrieved party may also pursue any other remedy provided by law.*~~

SECTION 11. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334B, Idaho Code, and to read as follows:

61-334B. COMMISSION SUPERVISION AND AUTHORITY. (1) Upon a petition by an electric supplier or consumer for an exception to the provisions of section 61-332B or 61-332C(1)(a), (b) or (c), Idaho Code, the commission shall issue an order granting such request only upon finding that granting the request is consistent with the purposes of this act as set forth in section 61-332, Idaho Code.

(2) The commission shall have power to issue authorizations and orders requested under this act, or to refuse to issue the same, and may attach to any authorization and order as a condition of approval such terms and conditions as it determines are consistent with the purposes and provisions of this act.

(3) In all matters arising under this act, which are submitted to the commission for decision, order or review, the procedure shall be governed by chapters 6 and 7, title 61, Idaho Code, and the commission's rules of procedure. Reconsideration of, appeal from, enforcement of, and stay of orders issued pursuant to this act shall be governed by law as for other orders of the commission in other matters.

SECTION 12. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334C, Idaho Code, and to read as follows:

61-334C. ELECTRIC SUPPLIER IMMUNITY. No action under the Idaho competition act, chapter 1, title 48,

Idaho Code, or any other provision or doctrine of law of the state of Idaho shall lie against an electric supplier for action or inaction that is in compliance with the provisions of this act or any commission order issued pursuant to this act.

SECTION 13. That Sections 61-332, 61-332A, 61-332B, 61-332C, 61-332D, 61-333, 61-334, 61-334A, 61-334B and 61-334C, Idaho Code, be, and the same are hereby repealed.

SECTION 14. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332, Idaho Code, and to read as follows:

61-332. PURPOSE OF ELECTRIC SUPPLIER STABILIZATION ACT. (1) This act includes sections 61-332, 61-332A, 61-332B, 61-332C, 61-333, 61-334, 61-334A and 61-334B, Idaho Code, as herein enacted, and sections 61-333A, 61-333B and 61-333C, Idaho Code, as already enacted, and shall be referred to herein as "this act" and may be cited and referred to as the "Electric Supplier Stabilization Act."

(2) This act is designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of customers of another supplier, discourage duplication of electric facilities, and stabilize the territories and customers served with electricity by such suppliers.

SECTION 15. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332A, Idaho Code, and to read as follows:

61-332A. DEFINITIONS FOR ELECTRIC SUPPLIER STABILIZATION ACT. As used in this act, unless the context requires otherwise:

(1) "Consumer" is any person, firm, corporation, or other entity receiving or intending to receive electric service at a specific service entrance.

(2) "Cooperative" means a cooperative corporation furnishing electric service in the state of Idaho to its consumer-members who own and operate the cooperative.

(3) "Electric service" means electricity furnished to an ultimate consumer by a supplier.

(4) "Existing service line" means any electric service line in existence at the time of the event in question and constructed to supply a consumer that could be lawfully served by that supplier under this act. It shall not mean any service line constructed to obtain an advantage under this act, or to evade its purpose or terms.

(5) "Municipality" means any municipal corporation or quasi-municipal corporation furnishing electric service to its citizens in the state of Idaho.

(6) "New service entrance" means a service entrance not previously served with electricity. A change, improvement, replacement, enlargement or change in location of a service entrance shall not be deemed a "new service entrance" if utilized to serve any service or utilization equipment previously served with electricity from the former service entrance, but for the rules of this act shall be deemed the former "service entrance." A change in consumer shall not be construed to make an existing service entrance a "new service entrance." A change, enlargement, or other modification of service or utilization

equipment served from an existing service entrance shall not be construed to make it a "new service entrance."

(7) "Public utility" means an electric utility regulated by the Idaho public utilities commission.

(8) "Service entrance" means the entrance of electric service from facilities of the supplier to the service equipment or utilization equipment of the consumer. In determining "service entrance" reference shall be made to the definition of "entrance of the service to the service equipment or utilization equipment" as defined in the national electrical code of 1965.

(9) "Service line" means any electric line of a supplier for carrying less than sixty-nine (69) KV and used or capable of use to provide electric service for a consumer.

(10) "Supplier" means any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.

(11) "Transmission line" means any electric line of a supplier for carrying a voltage of sixty-nine (69) KV or more.

SECTION 16. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332B, Idaho Code, and to read as follows:

61-332B. ELECTRIC SUPPLIER PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER SUPPLIER. No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connections to be made to any of its facilities for the purpose of supplying electric service

nor shall it supply or furnish electric service to any electric service entrance that is then or had at any time previously been connected for electric service to facilities of another electric supplier, without the written consent of such other electric supplier; provided however: (1) such other electric supplier is then, or was previously the last supplier, lawfully connected to said electric service entrance; and (2) such other electric supplier is willing and able to provide adequate electric service.

SECTION 17. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-332C, Idaho Code, and to read as follows:

61-332C. RULES FOR SELECTING ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES. In the event more than one (1) electric supplier is willing and able to provide adequate electric service to a consumer at any new electric service entrance, the following rules shall govern:

(1) If no electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance the consumer shall have the right of choice of supplier.

(2) If only one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance that supplier shall have the right to serve the consumer at the new service entrance.

(3) If more than one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance the supplier

whose existing service line is nearest the new service entrance shall have the right to serve the consumer at the new service entrance.

(4) If more than one (1) electric supplier has an existing service line within one thousand three hundred twenty (1,320) feet of the new service entrance and the existing service lines are equidistant from the service entrance, or it cannot be determined by proof which service line is nearest the new service entrance, then the consumer shall have the right of choice of supplier. No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connection to be made from any of its facilities to any new service entrance nor shall it supply electric service to any new service entrance in violation of the rules herein, without the written consent of any electric supplier with a prior right under the rules to serve the consumer at the new service locations.

SECTION 18. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-333, Idaho Code, and to read as follows:

61-333. AUTHORIZING CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES. (1) Any electric supplier may contract in writing with any other electric supplier for the purpose of allocating territories, consumers, and future consumers between the suppliers and designating which territories and consumers are to be served by which contracting supplier. The territories and consumers so allocated and designated may include all or any portion of the territories and consumers which are

being served by any or all of the contracting suppliers at the time the contract is entered into, or which could be economically served by the then existing facilities of any contracting supplier, or by reasonable and economic extensions thereto.

(2) Any electric supplier may also contract in writing with any other electric supplier for the sale, exchange, transfer or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection (1) of this section.

(3) Any contract validly entered pursuant to this section shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

SECTION 19. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334, Idaho Code, and to read as follows:

61-334. SPECIAL RULES OF INTERPRETATION. Nothing contained in this act shall be construed to:

(1) Grant Idaho public utilities commission jurisdiction over cooperatives or municipalities.

(2) Apply to controversies between two (2) or more public utilities.

(3) Preclude any electric supplier from extending electric service to its own property or facilities or to another electric supplier for resale, provided any line extension made under this clause shall not be considered in determining the right of suppliers to serve new service entrances under section 61-332C, Idaho Code.

SECTION 20. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334A, Idaho Code, and to read as follows:

61-334A. LEGAL RELIEF FOR AGGRIEVED ELECTRIC CONSUMER. (1) Any consumer of electricity who feels aggrieved with his present electric service may apply to the district court of the county of his residence for an order to show cause why he should not be permitted to change supplier, and if the court finds and concludes that the electric service is inadequate and will not likely be made adequate or that the rates are unreasonable and will not likely be made reasonable, the court may authorize the change to the new supplier.

(2) The present and prospective electric supplier shall both be made a party to any suit under this section.

(3) This section and any order hereunder shall not be construed to grant any franchise or right to a public utility or cooperative to commence electric service within a municipality where it does not already have such franchise or right.

SECTION 21. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334B, Idaho Code, and to read as follows:

61-334B. LEGAL REMEDIES FOR VIOLATION OF THIS ACT. (1) Any electric supplier whose rights under this act shall be violated or threatened with violation, shall be entitled to injunctive relief against said violation upon proper complaint and proof in accordance with Idaho rules of civil procedure in district court, against the other

electric supplier and any other person responsible for the violation.

(2) In any suit for injunctive relief findings and conclusions by the court that any rules under this act have been violated or threatened to be violated shall require findings and conclusions by the court of actual or threatened irreparable injury as to the electric supplier whose rights are violated or threatened with violation as a basis for equitable relief hereunder.

(3) The injunctive relief to be granted under this section for violation of this act shall be negative in form, enjoining further acts in violation of such rules, shall be affirmative in form in requiring removal of any electric connections, facilities or equipment that constitute the violation and shall be a combination thereof necessary to enforce compliance with this act.

(4) Any aggrieved party may also pursue any other remedy provided by law.

SECTION 22. An emergency existing therefor, which emergency is hereby declared to exist, Sections 1 through 12 of this act shall be in full force and effect on and after its passage and approval; Section 1 of this act shall be null, void and of no force and effect on and after March 1, 2001; and Sections 13 through 21 of this act shall be in full force and effect on and after March 1, 2001.

APPENDIX C

|||| LEGISLATURE OF THE STATE OF IDAHO ||||
Fifty-sixth Legislature First Regular Session – 2001

IN THE HOUSE OF REPRESENTATIVES
HOUSE BILL NO. 42
BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO THE ELECTRIC SUPPLIER STABILIZATION ACT; REPEALING CHAPTER 1, LAWS OF THE FIRST EXTRAORDINARY SESSION OF 2000; TO PROVIDE A STATEMENT OF INTENT; AMENDING SECTION 61-332, IDAHO CODE, TO CLARIFY THE PURPOSES OF THE ELECTRIC SUPPLIER STABILIZATION ACT AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-332A, IDAHO CODE, TO REVISE DEFINITIONS, TO DELETE A REFERENCE TO OBSOLETE MATERIAL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-332B, IDAHO CODE, TO REQUIRE APPROVAL OF THE PUBLIC UTILITIES COMMISSION FOR TRANSFERRING CONSUMERS; AMENDING SECTION 61-332C, IDAHO CODE, TO PROVIDE PROVISIONS FOR SELECTING AN ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-332D, IDAHO CODE, TO SUPERVISE WHEELING SERVICES; AMENDING SECTION 61-333, IDAHO CODE, TO REQUIRE ELECTRIC SERVICE TERRITORY CONTRACTS TO BE FILED WITH AND APPROVED BY THE PUBLIC UTILITIES COMMISSION TO PROVIDE FOR NOTICE AND HEARING REGARDING CONTRACT APPROVAL AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 61-334, IDAHO CODE, TO PROVIDE THAT THE PUBLIC

UTILITIES COMMISSION HAS CERTAIN AUTHORITY OVER ELECTRIC SUPPLIERS, TO PROVIDE FOR APPLICATION OF PUBLIC UTILITIES LAW AND TO MAKE TECHNICAL CORRECTIONS; REPEALING SECTION 61-334A, IDAHO CODE; AMENDING SECTION 61-334B, IDAHO CODE, TO REDESIGNATE THE SECTION, TO PROVIDE FOR FILING A COMPLAINT WITH THE PUBLIC UTILITIES COMMISSION, TO PROVIDE FOR NOTICE AND HEARINGS, TO PROVIDE REMEDIES AND TO MAKE TECHNICAL CORRECTIONS; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334B, IDAHO CODE, TO PROVIDE COMMISSION SUPERVISION AND AUTHORITY; AMENDING CHAPTER 3, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-334C, IDAHO CODE, TO PROVIDE ELECTRIC SUPPLIER IMMUNITY; AMENDING SECTION 30-3-14, IDAHO CODE, TO PROVIDE THAT ANY MEMBER OF A COOPERATIVE ASSOCIATION THAT PROVIDES ELECTRIC SERVICE MAY APPLY TO THE DISTRICT COURT OF THE COUNTY WHERE THE MEMBER'S SERVICE ENTRANCE IS LOCATED FOR A DETERMINATION THAT THE COOPERATIVE ASSOCIATION'S CHARGES FOR ELECTRIC SERVICE TO THAT MEMBER ARE FAIR, JUST AND REASONABLE AND ARE NOT DISCRIMINATORY OR PREFERENTIAL AND TO PROVIDE CIRCUMSTANCES WHEN THE COURT WILL REMAND THE MATTER TO THE COOPERATIVE ASSOCIATION; AMENDING SECTION 50-325, IDAHO CODE, TO PROVIDE THAT ANY CONSUMER OF A MUNICIPAL ELECTRIC SYSTEM MAY APPLY TO THE DISTRICT COURT OF THE COUNTY WHERE THE CONSUMER'S SERVICE ENTRANCE IS LOCATED FOR A DETERMINATION THAT THE MUNICIPALITY'S CHARGES FOR ELECTRIC SERVICE TO THAT CONSUMER ARE FAIR,

JUST AND REASONABLE AND NOT DISCRIMINATORY OR PREFERENTIAL, TO PROVIDE CIRCUMSTANCES WHEN THE COURT WILL REMAND THE MATTER TO THE MUNICIPALITY AND TO MAKE A TECHNICAL CORRECTION; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 1, Laws of the First Extraordinary Session of 2000, be, and the same is hereby repealed.

SECTION 2. LEGISLATIVE INTENT. The provision of a safe and reliable supply of electricity in a manner that prohibits the "pirating" of consumers and discourages duplication of facilities is essential to the well-being of Idaho's citizens and its economy. It was for these and other reasons that the legislature passed the Electric Supplier Stabilization Act in 1970. The legislature has been advised of federal antitrust litigation alleging that conformance with the provisions of this act does not confer federal antitrust immunity upon parties in compliance with the act. The legislature fines that a negative judicial ruling would have the effect of repealing applicable provisions of the act, undercutting the purposes for which this act was enacted.

It is and has been the intention of the legislature to confer antitrust immunity upon parties acting in compliance with the act under what is known as the state action doctrine. While the legislature believes that compliance with the existing provisions of this act confers such immunity, it has determined to amend the act to more fully address this issue. The legislature therefore find that it is in the public interest to enact the following amendments.

It is the intent of the legislature in enacting Sections 14 and 15 of this act that relevant court precedent in existence on the effective date of this act be applicable in the interpretation of Sections 30-3-14 and 50-325, Idaho Code. Such court precedent shall include, but not be limited to, Kiefer v. City of Idaho Falls, 49 Idaho 458 (1930).

SECTION 3. That Section 61-332, Idaho Code, be, and the same is hereby amended to read as follows:

61-332. PURPOSE OF ELECTRIC SUPPLIER STABILIZATION ACT. ~~A.~~ **(1)** This act includes sections 61-332, ~~*61-332A, 61-332B, 61-332C, 61-333, 61-334, 61-334A, and*~~ **through** 61-334~~*B*~~**C,** Idaho Code, ~~*as herein enacted, section 61-333A, Idaho Code, as herein amended, and sections 61-333B and 61-333C, Idaho Code, as already enacted*~~, and shall be referred to herein as "this act" and may be cited and referred to as the "~~*e*~~**E**lectric ~~*s*~~**S**upplier ~~*s*~~**S**tabilization ~~*a*~~**A**ct."

~~*B.*~~ **(2)** This act ~~*is*~~ **and its amendments are** designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the "pirating" of ~~*customers*~~ **consumers** of another **electric** supplier, discourage duplication of electric facilities, **actively supervise certain conduct of electric suppliers as it relates to this act,** and stabilize the territories and ~~*customers*~~ **consumers** served with electricity by such **electric** suppliers.

SECTION 4. That Section 61-332A, Idaho Code, be, and the same is hereby amended to read as follows:

61-332A. DEFINITIONS FOR ELECTRIC SUPPLIER STABILIZATION ACT. As used in this act, unless the context requires otherwise:

(1.) "Public utility" means an electric utility regulated by the Idaho public utilities commission.

(2.) "Cooperative" means a cooperative corporation furnishing electric service in the state of Idaho to its consumer-members who own and operate the cooperative.

(3.) "Municipality" means any municipal corporation or quasi-municipal corporation furnishing electric service to ~~*its citizens*~~ **the consumers of the municipality** in the state of Idaho.

(4.) "**Electric s**Supplier" means any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.

(5.) "Electric service" means electricity furnished to an ultimate consumer by a**n electric** supplier.

(6.) "Consumer" is any person, firm, corporation, or other entity receiving or intending to receive electric service at a specific service entrance.

(7.) "Service entrance" means the ~~*entrance of electric service from facilities of the supplier to the service equipment or utilization equipment of the consumer. In determining "service entrance" reference shall be made to the definition of "entrance of the service to the service equipment or utilization equipment" as defined in the national electrical code of 1965*~~ **location on the consumer's property where the consumer's main disconnect switch, fuses or other disconnect equipment exists,**

and which are intended to provide the means of cutoff of the supply.

(8.) "New service entrance" means a service entrance not previously served with electricity. A change, improvement, replacement, enlargement, or change in location of a service entrance shall not be deemed a "new service entrance" if utilized to serve any service or utilization equipment previously served with electricity from the former service entrance, but for the ~~*rules*~~ **provisions** of this act shall be deemed the former "service entrance." A change in consumer shall not be construed to make an existing service entrance a "new service entrance." A change, enlargement, or other modification of service or utilization equipment served from an existing service entrance shall not be construed to make it a "new service entrance."

(9.) "Transmission line," **for the purposes of this act,** means any electric line of a**n electric** supplier ~~*for*~~ carrying a voltage of sixty-nine (69) KV or more.

(10.) "Service line," **for the purposes of this act,** means any **single or multi-phase** electric line of a**n electric** supplier **used** for carrying less than sixty-nine (69) KV and used or capable of use to provide electric service for a consumer.

(11.) "Existing service line" means any electric service line in existence at the time of the event in question and constructed to supply a consumer that could be lawfully served by that **electric** supplier under this act. It shall not mean any service line constructed to obtain an advantage under this act, or to evade its purpose or terms.

(12) "Commission" means the Idaho public utilities commission.

SECTION 5. That Section 61-332B, Idaho Code, be, and the same is hereby amended to read as follows:

61-332B. ELECTRIC SUPPLIER PROHIBITED FROM SERVING CONSUMERS OR FORMER CONSUMERS OF ANOTHER **ELECTRIC** SUPPLIER. No electric supplier shall ~~*construct or extend facilities, nor make any electric connections, nor permit any connections to be made to any of its facilities for the purpose of supplying electric service nor shall it*~~ supply or furnish electric service to any electric service entrance that is then or had at any time previously been **lawfully** connected for electric service to facilities of another electric supplier, ~~*without the written consent of such other electric supplier; provided, however, (a) such other electric supplier is then, or was previously the last supplier, lawfully connected to said electric service entrance, and (b) such other electric supplier is willing and able to provide adequate electric service*~~ **except as provided in this act.**

SECTION 6. That Section 61-332C, Idaho Code, be, and the same is hereby amended to read as follows:

61-332C. ~~*RULES*~~ **PROVISIONS** FOR SELECTING ELECTRIC SUPPLIER FOR NEW ELECTRIC SERVICE ENTRANCES. **(1)** In ~~*the event more than one electric supplier is willing and able to provide adequate electric service to a consumer at any new electric service entrance, the following rules shall*~~ **determining which electric supplier will provide electric service for a new service entrance, the following provisions will** govern:

~~1.~~**(a)** If no electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of ~~the~~ **a** new service entrance the consumer shall have the right of choice of **electric** supplier.

~~2.~~**(b)** If only one (1) electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance that **electric** supplier shall have the right to serve the consumer at the new service entrance.

~~3.~~**(c)** If more than one **(1)** electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance the **electric** supplier whose existing service line is nearest the new service entrance shall have the right to serve the consumer at the new service entrance.

~~4.~~**(d)** If more than one **(1)** electric supplier has an existing service line within one thousand three hundred ~~and~~ twenty **(1,320)** feet ~~(1,320 ft.)~~ of the new service entrance ~~and the existing service lines are equidistant from the service entrance, or~~ **and** it cannot be determined by proof which service line is nearest the new service entrance, then the consumer ~~shall have the right of choice of supplier~~ **or an electric supplier shall petition the commission for an order determining which electric supplier is nearest the new service entrance.**

(e) For purposes of this act distances shall mean the exact distance measured using standard land surveying practices as established by the board of professional

engineers and land surveyors of the state of Idaho.

(2) No electric supplier shall construct or extend facilities, nor make any electric connections, nor permit any connection to be made from any of its facilities to any new service entrance nor shall it supply electric service to any new service entrance in violation of the ~~*rules herein, without the written consent of any electric supplier with a prior right under the rules to serve the consumer at the new service locations*~~ **provisions of this section, except as ordered by the commission pursuant to this act.**

SECTION 7. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION** to be known and designated as Section 61-332D, Idaho Code, and to read as follows:

61-332D. WHEELING SERVICES. (1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or a sham wholesale transaction.

(2) An electric supplier declining to furnish wheeling service pursuant to this section shall petition the commission for review of the electric suppliers action in respect to a request for such service. The commission shall, upon notice and opportunity for hearing, review the electric supplier's action for consistency with the purposes and provisions of this act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

SECTION 8. That Section 61-333, Idaho Code, be, and the same is hereby amended to read as follows:

61-333. AUTHORIZING CONTRACTS AMONG ELECTRIC SUPPLIERS TO RESOLVE TERRITORIES, CONSUMERS AND TO TRANSFER FACILITIES. ~~A.~~**(1)** Any electric supplier may contract in writing with any other electric supplier for the purpose of allocating territories, consumers, and future consumers between the **electric** suppliers and designating which territories and consumers are to be served by which contracting **electric** supplier. The territories and consumers so allocated and designated may include all or any portion of the territories and consumers which are being served by any or all of the contracting **electric** suppliers at the time the contract is entered into, or which could be economically served by the then existing facilities of any contracting **electric** supplier, or by reasonable and economic extensions thereto. **All such contracts shall be filed with the commission. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between cooperatives, between cooperatives and public utilities and between public utilities. The commission shall, after notice and opportunity for hearing, review and approve or reject contracts between municipalities and cooperatives, as well as between municipalities and public utilities, provided however, the commission shall have jurisdiction only over cooperatives and public utilities in such approvals. The commission shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act.**

~~B.~~**(2)** Any electric supplier may also contract in writing with any other electric supplier for the sale,

exchange, transfer, or lease of equipment or facilities located within territory which is the subject of any allocation contracted for under subsection ~~*A hereof. C. Any*~~ **(1) of this section and any** contract validly entered ~~*pursuant to this section*~~ **into and approved by the commission after notice and opportunity for hearing** shall be binding and shall be legally enforceable pursuant to this act, or by any other remedy provided by law.

SECTION 9. That Section 61-334, Idaho Code, be, and the same is hereby amended to read as follows:

61-334. SPECIAL RULES OF INTERPRETATION. Nothing contained in this act shall be construed to:

(1.) Grant ~~*Idaho public utilities*~~ **the** commission jurisdiction over cooperatives or municipalities **except as authorized in this act.**

(2.) Apply to controversies between two (2) or more public utilities.

(3.) Preclude any electric supplier from extending electric service to its own property or facilities or to another electric supplier for resale, provided any line extension made under this clause shall not be considered in determining the right of **electric** suppliers to serve new service entrances under section 61-332C, Idaho Code.

(4.) Abrogate or limit the authority of any municipality under any other statute or law with respect to the municipality providing electricity to the municipality or the consumers of the municipality within the boundaries of the municipality.

SECTION 10. That Section 61-334A, Idaho Code, be, and the same is hereby repealed.

SECTION 11. That Section 61-334B, Idaho Code, be, and the same is hereby amended to read as follows:

61-334~~B~~**A**. ~~*LEGAL*~~ REMEDIES FOR VIOLATION OF THIS ACT. ~~*A.*~~**(1)** Any electric supplier **or consumer** whose rights under this act shall be violated or threatened with violation, ~~*shall be entitled to injunctive relief against said violation upon proper*~~ **may file a** complaint ~~*and proof in accordance with Idaho rules of civil procedure in district court, against the other*~~ **with the commission against an** electric supplier and any other person responsible for the violation.

~~*B.*~~**(2)** ~~*In any suit for injunctive relief*~~ **After notice and opportunity for hearing, the commission shall make** findings **of fact** and conclusions ~~*by the court that any rules under*~~ **of law determining whether** this act **or any orders issued under this act** have been violated or threatened to be violated **and** shall ~~*require findings and conclusions by the court of*~~ **determine whether there is** actual or threatened irreparable injury as to the electric supplier **or consumer** whose rights are violated or threatened with violation as a basis for ~~*equitable relief hereunder*~~ **granting relief.**

~~*C.*~~**(3)** The ~~*injunctive*~~ relief to be granted under this section for violation of this act shall ~~*be negative in form, enjoining*~~ **forbid** further acts in violation of such ~~*rules*~~ **orders**, shall ~~*be affirmative in form in requiring*~~ **order the** removal of any electric connections, facilities or equipment that constitute the violation, ~~*and shall be*~~ **or** a combination thereof necessary to enforce compliance with this act.

~~*D. Any aggrieved party may also pursue any other remedy provided by law.*~~

SECTION 12. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334B, Idaho Code, and to read as follows:

61-334B. COMMISSION SUPERVISION AND AUTHORITY. (1) Upon a petition by an electric supplier or consumer for an exception to the provisions of section 61-332B or 61-332C(1)(a), (b) or (c), Idaho Code, the commission shall issue an order granting such request upon finding that granting the request is consistent with the purposes of this act as set forth in section 61-332, Idaho Code.

(2) The commission shall have power to issue authorizations and orders requested under this act, or to refuse to issue the same, and may attach to any authorization and order as a condition of approval such terms and conditions as it determines are consistent with the purposes and provisions of this act.

(3) In all matters arising under this act, which are submitted to the commission for decision, order or review, the procedure shall be governed by chapters 6 and 7, title 61, Idaho Code, and the commission's rules of procedure. Reconsideration of, appeal from, enforcement of, and stay of orders issued pursuant to this act shall be governed by law as for other orders of the commission in other matters.

SECTION 13. That Chapter 3, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a **NEW SECTION**, to be known and designated as Section 61-334C, Idaho Code, and to read as follows:

61-334C. ELECTRIC SUPPLIER IMMUNITY. No action under the Idaho competition act, chapter 1, title 48, Idaho Code, or any other provision or doctrine of law of the state of Idaho shall lie against an electric supplier for action or inaction that is in compliance with the provisions of this act or any commission order issued pursuant to this act.

SECTION 14. That Section 30-3-14, Idaho Code, be, and the same is hereby amended to read as follows:

30-3-14. JUDICIAL RELIEF. (1) If for any reason it is impractical or impossible for any corporation to call or conduct a meeting of its members, delegates or directors, or otherwise obtain their consent, in the manner prescribed by its articles, bylaws or this act, then upon petition of a director, officer, delegate, or member, the district court may order that such a meeting be called or that a written ballot or other form of obtaining the vote of members, delegates or directors be authorized, in such a manner as the court finds fair and equitable under the circumstances.

(2) The court shall, in an order issued pursuant to this section, provide for a method of notice reasonably designed to give actual notice to all persons who would be entitled to notice of a meeting held pursuant to the articles, bylaws and this act, whether or not the method results in actual notice to all such persons or conforms to the notice requirements that would otherwise apply. In a proceeding under this section the court may determine who the members or directors are.

(3) The order issued pursuant to this section may dispense with any requirements relating to the holding of or voting at meetings or obtaining votes, including

any requirement as to quorums or as to the number or percentage of votes needed for approval, that would otherwise be imposed by the articles, bylaws or this act.

(4) Whenever practical, any order issued pursuant to this section shall limit the subject matter of meetings or other forms of consent authorized to items, including amendments to the articles or bylaws, the resolution of which will or may enable the corporation to continue managing its affairs without further resort to this section; provided however, that an order under this section may also authorize the obtaining of whatever votes and approvals are necessary for the dissolution, merger or sale of assets.

(5) Any meeting or other method of obtaining the vote of members, delegates or directors conducted pursuant to an order issued under this section, and that complies with all the provisions of such order, is for all purposes a valid meeting or vote, as the case may be, and shall have the same force and effect as if it complied with every requirement imposed by the articles, bylaws and this act.

(6) Any member of a cooperative association that provides electric service may apply to the district court of the county where the member's service entrance is located for a determination that the cooperative association's charges for electric service to that member are fair, just and reasonable and are not discriminatory or preferential. In the event that the court determines that the rate is not fair, just and reasonable or its discriminatory or preferential, the court shall remand the matter to the cooperative association

to alter or amend the rate in conformance with the standards set forth herein.

SECTION 15. That Section 50-325, Idaho Code, be, and the same is hereby amended to read as follows:

50-325. POWER PLANTS – POWER DISTRIBUTION. **(1)** Cities shall have authority: to acquire, own, maintain and operate electric power plants, purchase electric power, and provide for distribution to the residents of the city, and to sell excess power subject to the provisions of section 50-327**, Idaho Code.**

(2) Any consumer of a municipal electric system may apply to the district court of the county where the consumer's service entrance is located for a determination that the municipality's charges for electric service to that consumer are fair, just and reasonable and are not discriminatory or preferential. In the event that the court determines that the rate is not fair, just and reasonable or is discriminatory or preferential, the court shall remand the matter to the municipality to alter or amend such rate in conformance with the determination of the court.

SECTION 16. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Supreme Court, U.S.
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No. 04-98

IN THE

Supreme Court of the United States

SNAKE RIVER VALLEY ELECTRIC ASSOCIATION,
Petitioner,

v.

PACIFICORP
(INCLUDING UTAH POWER & LIGHT COMPANY, A DIVISION),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF TO BRIEFS IN OPPOSITION BY RESPONDENTS PACIFICORP AND STATE OF IDAHO

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QUESTIONS PRESENTED

1. Whether, under *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the adjudication of the Sherman Act (15 U.S.C. § 1, *et seq.*) under the federal antitrust laws by the district court requires, as a condition precedent, the filing by the party seeking antitrust relief of an application for wheeling with the Federal Energy Regulatory Commission under the Federal Power Act.

2. Whether, under *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), and *Patrick v. Burgett*, 586 U.S. 94, 101 (1988), the provisions of the Sherman Act of the federal antitrust laws are superseded under the state action immunity doctrine where the State has never held any hearing or made any adjudication to "exercise ultimate control over the challenged [private] anticompetitive conduct."

3. Whether, under *New York, et al. v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002) and *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927), the state statute relied on by the courts below to provide antitrust immunity, the Idaho State Electric Supplier Stabilization Act of December 8, 2000, conflicted with the bright, clear line drawn by the Commerce Clause of the Constitution establishing that the states lack jurisdiction to adjudicate wheeling of wholesale power.

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II. THE COURTS BELOW ERRED IN RULING THAT THE AMENDED ESSA AUTOMATICALLY SUPERSEDED THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S DECISIONS IN *MIDCAL*, *TICOR*, AND *BURGETT*, AS WELL AS THE NINTH CIRCUIT'S DECISION IN *SNAKE RIVER I*. 5

III. THE AMENDED ESSA CAN PROVIDE NO IMMUNITY FROM THE FEDERAL ANTITRUST LAWS BECAUSE THE STATE LACKS JURISDICTION TO ADJUDICATE WHEELING OF WHOLESALE POWER IN INTERSTATE COMMERCE. 9

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Both the Respondent, PacifiCorp, and Intervenor, Attorney General of the State of Idaho, fail to address the major issues presented by Petitioner, Snake River Valley Electric Association ("Snake River" or "SRVEA") based on the decisions by the courts below, which directly conflict with and seriously undermine the long-established precedents of this Court:

(1) Governing the exclusive jurisdiction of the federal courts, not the Federal Energy Regulatory Commission ("FERC"), to adjudicate the application of the federal antitrust laws under *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973);

(2) Holding that the state has no authority to grant immunity from those federal antitrust laws under controlling decisions by this Court in *California Retail Liquor Dealers v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980), *Ticor Title Ins. Co.*, 504 U.S. 621 (1992), and *Patrick v. Burgett*, 486 U.S. 94 (1988), as well as the prior decision below by the Ninth Circuit in *Snake River I*, 238 F.3d 1189 (9th Cir. 2001), that no immunity from the federal antitrust laws exists based on the date of enactment of a new state law (the Amended ESSA[1] of December 8, 2000), where the Idaho Public Utility Commission has never determined under that new law whether Snake River's request for wheeling by PacifiCorp of wholesale power acquired by Snake River "results in retail wheeling and/or a sham wholesale transaction"; and

(3) Holding under long-established decisions in *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927), *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964), and *New York, et al. v. Federal Energy Regulatory Commission, et al.*, 535 U.S. 1 (2002), that the states have no jurisdiction

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[1] Electric Supplier Stabilization Act, amended December 8, 2000, Idaho Code 61-332D.

over sales and transportation of wholesale power in interstate commerce.

The contentions by Respondent PacifiCorp and the Idaho Attorney General improperly seek to negate this Court's long-standing decisions construing the applicability of the federal antitrust laws *vis-à-vis* the Federal Power Act and the state immunity doctrine, and pose major issues regarding the future application of the federal antitrust laws.

I. PACIFICORP AND THE IDAHO ATTORNEY GENERAL PRESENT CONFLICTING VIEWS AS TO WHETHER SNAKE RIVER HAD TO FILE A REQUEST FOR WHEELING WITH THE FEDERAL ENERGY REGULATORY COMMISSION UNDER THE FEDERAL POWER ACT AS A CONDITION PRECEDENT TO ANY RELIEF UNDER THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S LONG-ESTABLISHED DECISION IN *OTTER TAIL POWER CO. v. UNITED STATES.*

In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court, in what has been regarded as a landmark decision, definitively rejected the contention by a utility (Otter Tail, comparable to PacifiCorp in the present case) that the Federal Power Act, 16 U.S.C. §824 *et seq.*, immunizes utilities from the federal antitrust laws with respect to refusal to wheel or sell power to a competitor. This Court held:

> ...Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations.

410 U.S. 374-375.

The Idaho Attorney General never addresses the contrary major legal premise underlying the decisions of the court

below denying Snake River any relief under the federal antitrust laws, but presents an argument that directly conflicts with the basic contention by PacifiCorp that any antitrust relief for Snake River is dependent upon Snake River's compliance with rules established by the FERC governing the transmission of wholesale power in interstate commerce. The State Attorney General contends that the Amended ESSA, enacted December 8, 2000, gives the state public utility commission the exclusive jurisdiction to determine whether a utility is required to provide wheeling over its system.[2] Since the Idaho Attorney General's argument that antitrust immunity for refusal to wheel by PacifiCorp was based solely on the enactment of the Amended ESSA—a position that gives the state public utility commission authority to determine if wheeling was required, and also is

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[2] The Amended ESSA provided as follows:

> Idaho Code 61-332D. WHEELING AND SERVICES.
>
> (1) An electric supplier shall not be required to provide wheeling service over its system if such service results in retail wheeling and/or an sham wholesale transaction.
>
> (2) An electric supplier declining to furnish electric service pursuant to this section shall petition the [State Public Utility] Commission for review of the electric supplier's action in respect to a request for such service. The Commission shall, upon notice and opportunity for a hearing, review the electric supplier's action for consistency with the purposes and provisions of this Act, and issue an order in accordance with its finding, ordering either that the wheeling service shall, or shall not, be required.

In the present case, PacifiCorp filed an application for summary judgment with the Idaho Public Utility Commission under this section to deny wheeling to Snake River. The Commission, in an order issued October 31, 2001, rejected PacifiCorp's motion for summary judgment and ordered a hearing. Subsequently, after the district court issued its order on February 7, 2002, ruling that "PacifiCorp had state action immunity for its actions after December 8, 2000, when the amendment to the ESSA took effect," Pet. App. 24a, the state commission took no further action on PacifiCorp's application under the Amended ESSA, and never ruled that PacifiCorp "shall not be required to provide wheeling service over its system."

diametrically opposed to the position of PacifiCorp that the issue was controlled by the FERC and its regulations—there is further strong support for this Court to grant certiorari over this important issue governing the application of the federal antitrust laws.

PacifiCorp itself never directly addresses the issue as to whether its claim, repeated throughout the trial, that Snake River's entitlement to wheeling under the federal antitrust laws was dependent on compliance with FERC regulations, is in conflict with this Court's holding in *Otter Tail*:

> Thus, there is no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for or immunize Otter Tail from antitrust regulation for refusing to deal with municipal corporations.
>
> 410 U.S. 374-375.

PacifiCorp's argument (Br. 10-13) that there was no antitrust violation because SRVEA was able to enter into a contract for lower-cost wholesale power with Idaho Power Company, and later, Enron Power Marketing, presents no answer to the controlling question in this case: whether PacifiCorp's refusal to wheel that power to Snake River over its transmission system violated the federal antitrust laws. Snake River was denied the use of this low-cost power solely because of PacifiCorp's consistent refusal since 1993 to wheel or sell power to Snake River. The conclusive evidence in the case demonstrated that PacifiCorp had monopoly control over the transmission required for the wheeling of that power to Snake River for resale to its members. The district court itself concluded that the antitrust issue was properly before the jury:

> That leaves the claim that PacifiCorp has refused to wheel power to Snake River. Dr. Wilson concludes that PacifiCorp has a monopoly in the transmission of power in Snake River's market territory of eastern Idaho...Dr.

> Wilson further concludes that "it is not economically feasible for [Snake River] to build alternative transmission lines to receive power from sources other than PacifiCorp, *id.* at p. 9, ¶23."

The jury confirmed Dr. Wilson's conclusions in its first two findings. Pet. App. 26a. Regarding Questions 1 and 2, the jury found that PacifiCorp's power lines, which served SRVEA's potential customers, were essential to effective competition in the market for electric power in that area of central Idaho, and that it was impractical or uneconomical for SRVEA to construct its own facilities to serve its potential customers. *See* Pet. at 5.

Thus, PacifiCorp's sole argument in its brief in opposition—that the *Otter Tail* ruling that the federal antitrust laws, not the Federal Power Act, govern a refusal to wheel because PacifiCorp does not have monopoly power—is simply clearly erroneous.

PacifiCorp's erroneous position reinforces the importance of this case to the future administration of the federal antitrust laws with respect to the federal district courts, the FERC, and the state public utility commissions.

II. THE COURTS BELOW ERRED IN RULING THAT THE AMENDED ESSA AUTOMATICALLY SUPERSEDED THE FEDERAL ANTITRUST LAWS, CONTRARY TO THIS COURT'S DECISIONS IN *MIDCAL*, *TICOR*, AND *BURGETT*, AS WELL AS THE NINTH CIRCUIT'S DECISION IN *SNAKE RIVER I*.

Both Respondent PacifiCorp and the Idaho Attorney General err in contending that the courts below properly granted immunity from the federal antitrust laws upon the enactment of the Amended ESSA on December 8, 2000, without any determination of PacifiCorp's application under that statute that the wheeling service sought by Snake River

would result in "retail wheeling and/or a sham wholesale transaction."[3] The Idaho Attorney General argues that:

> ...There is no precedent for the proposition that state action immunity only attaches after a State undertakes and finally resolves a specific matter entrusted to a specific governmental agency...

Brief in Opposition at 14. This contention is flatly contradicted not only by the three leading Supreme Court cases, but also by the Ninth Circuit decision in *Snake River I*, 238 F.3d 1189 (9th Cir. 2001).[4]

In *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992), the Court cited *Patrick v. Burgett* as follows:

> "The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interest, rather than the governmental interest of the State. ...The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenge to anticompetitive conduct. ...The mere presence of some state involvement or monitoring does not suffice. ...The active supervision prong of the *Midcal* test requires that state officials have and

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[3] The Amended ESSA, §61-332D, specifically provided:

> The Commission shall, upon notice and opportunity for a hearing, review the electric supplier's action for consistency with the purposes and provisions of this Act, and issue an order in accordance with its finding, *ordering either that the wheeling service shall, or shall not, be required.*

Emphasis added.

[4] This decision was final and thus should have been the controlling law of the case governing the remand proceedings in the courts below.

> exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy rather than merely the party's individual interests."
>
> * * *
>
> Because the particular anticompetitive conduct at issue in *Patrick* had not been supervised by government actors, we decided that the actions of the peer review committee were not entitled to state-action immunity.
>
> * * *
>
> Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices had been established as a product of deliberate State intervention, not simply by agreement among private parties.

In *California Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 at 105, the Court held that the second prong of the test for antitrust immunity is not met where:

> The state neither establishes prices nor reviews the reasonableness of the price schedule; nor does it regulate the terms of fair trade contracts, the State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national program in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.

The Ninth Circuit in *Snake River I*, 238 F.3d 1189 (9th Cir. 2001) held that PacifiCorp had no immunity under the Original ESSA because it did not meet the second prong of the *Midcal* test, which..."requires that the state 'exercise ultimate control over the challenged [private] anticompetitive conduct,' *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992)," 238 F.3d at 1193. The Ninth Circuit also held that

"this prong ensures that the 'state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.' *Patrick v. Burgett*, 486 U.S. 94, 101...(1998)." The Ninth Circuit also rejected the district court's conclusion that active supervision by the state of other cases satisfies the test by distinguishing *Nugget Hydroelectric, L.P. v. Pacific Gas and Electric Co.*, 981 F.2d 429 (9th Cir. 1992), because:

> ...While *Nugget* does hold that an equivalent number of cases act as active supervision...*those cases all involved reviews of the specific conduct at issue in Nugget.* ...The mere presence of cases reviewing general violations of the ESSA does not amount to active supervision in this case.

238 F.3d at 1195; emphasis added.

Based on these precedents, it is clear that the courts below erred in directly conflicting with the controlling decisions by this Court in *Midcal*, *Ticor*, and *Burgett*, as confirmed by the Ninth Circuit itself in *Snake River I*, by holding that the mere enactment of the Amended ESSA on December 8, 2000 barred any antitrust relief to Snake River as of that date. The decision below severely undercuts the effectiveness of the federal antitrust laws by concluding that enactment of the Amended ESSA automatically, as of that date, granted antitrust immunity to PacifiCorp, absent any specific State review or ruling on the particular merits and issues of PacifiCorp's original claim that Snake River's request for wheeling constituted a sham wholesale transaction.[5]

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[5] PacifiCorp claims that its failure to pursue and obtain an order under §61-332D of the Amended ESSA to bar it from wheeling to Snake River can be overlooked by referring to another section, §61-332B, which it claims also applies retroactively to Snake River. This claim is patently fallacious. Snake River's members joined Snake River when the cooperative was established in 1993 and in the years before enactment of the statute. This issue has nationwide importance to the future of all municipals and electric cooperatives, because it would enable a state to

III. THE AMENDED ESSA CAN PROVIDE NO IMMUNITY FROM THE FEDERAL ANTITRUST LAWS BECAUSE THE STATE LACKS JURISDICTION TO ADJUDICATE WHEELING OF WHOLESALE POWER IN INTERSTATE COMMERCE.

The arguments on the merits by PacifiCorp and the Idaho Attorney General never address the clear, long line of cases by this Court holding that sales of electric power at wholesale for resale in interstate commerce are not subject to the jurisdiction of the States; starting with *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927) under the Constitution, to *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964), holding that the Federal Power Act established "a bright line" between federal and state jurisdiction, to *New York, et al. v. Federal Energy Regulatory Commission, et al.*, 535 U.S. 1 (2002), affirming that any issue of "retail-turned-wholesale" or "sham wholesale transaction" falls exclusively within federal jurisdiction.

The issue was thoroughly briefed and argued in the district court and was also before the appeals court.

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require any cooperative or municipal to give up its long-held membership to a utility company.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below summarily reversed, or the case set for argument.

Respectfully submitted,

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